

CANADIAN CHARTER EQUALITY RIGHTS FOR WOMEN

One Step Forward or Two Steps Back?



Canadian
Advisory Council
on the Status of Women



Conseil
consultatif canadien
sur la situation de la femme

**CANADIAN CHARTER EQUALITY RIGHTS FOR WOMEN:
ONE STEP FORWARD OR TWO STEPS BACK?**

by Gwen Brodsky and Shelagh Day

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Canadian Advisory Council on the Status of Women

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K1P 5R5

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Gwen Brodsky
Shelagh Day

FOREWORD

I would like to thank the members of the Legal Status Committee of the Canadian Advisory Council on the Status of Women for their contribution to this book. Recognizing the significance of the *Canadian Charter of Rights and Freedoms* for women's equality, the Committee identified the need for analysing the first three years of equality rights litigation. The members have firmly placed this publication within the mandate of the Advisory Council: to inform the government and educate the public on matters of interest and concern to women.

In commissioning this book, the members of the Legal Committee, with the full support of all Council members, have expressed their ongoing commitment to advancing women's equality in Canada as we enter the 1990s.

Sylvia Gold
President

PREFACE

This analysis of the first three years of equality rights litigation under Canada's new Constitution was completed before February 2, 1989 when the Supreme Court of Canada handed down its decision in the case of [Mark] *Andrews v. The Law Society of British Columbia*. The *Mark Andrews* decision is the Supreme Court's first interpretation of the equality guarantees of the Charter. It was clear at the time of writing that the decision in this case could set the direction for future interpretation, and it is referred to frequently in this study with anticipation. Because the decision is now available, the authors have included a brief note at the end of the study to comment on the decision's content and its import for the future of equality rights litigation in Canada (see Postscript: *Mark Andrews*).

SELECTED SECTIONS OF THE CHARTER OF RIGHTS AND FREEDOMS

I Equality Guarantees

15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

II Limits

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

33.(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

III Scope

32.(1) This Charter applies

- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
- (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

IV Remedies

24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

52.(1)* The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

*Although technically not part of the Charter, this section is part of the Constitution and is relevant to Charter remedies.

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Three Years Later

Women have invested hard work and important hopes in Canada's new Constitution¹ and the guarantees of equality in the *Charter of Rights and Freedoms*.² Now that the equality guarantees have been in effect for more than three years, some basic questions can be asked and answered. Are women using the Charter? How are the courts interpreting the equality guarantees? Are the guarantees helping women? What factors will determine whether women are helped by the Charter in the long run?

To answer these questions and many others, the authors of this study collected and analysed the 591 reported and unreported decisions handed down by courts at all levels during the first three years that section 15 of the Charter was in effect.³ Information about the decisions was consolidated in a computerized database. This has made it possible to identify patterns in the cases and to provide statistics about who is using the equality guarantees, and to what ends. By focussing particularly on the cases in which sex equality arguments were made, while considering **all** the decisions handed down, this study sets women's sex equality litigation in its full context.

The news is not good. Women are initiating few cases, and men are using the Charter to strike back at women's hard-won protections and benefits. At the time of writing, the Supreme Court of Canada had not delivered its first judgement concerning the equality guarantees.⁴ But the theories of equality and interpretive tests that, to date, have been applied by other courts in Canada will not improve women's condition.

This means that there is much more work to be done. The barriers to women's access to the courts must be removed, and interpretations of equality which are meaningful to women must be advanced more often in the courts. In addition, women must be actively concerned about judicial appointments as well as the education of lawyers and judges.

Recently some commentators⁵ have questioned the wisdom of investing work and hope in the Charter. These critics of entrenched rights argue that disadvantaged groups should not look to the courts for assistance with their equality problems because the courts are, by nature, undemocratic and elitist. By and large, judges are white, middle-aged, middle-class men with no direct experience of disadvantage. And the courts, it has been argued, are not known to be agents of change. These commentators contend that women and other disadvantaged groups would be wiser to put their efforts into the democratic system, trying to change conditions of disadvantage through political rather than legal means.

This position is not without justification. Indeed, this study appears to support the views of these critics to the extent that its findings give reason for concern about the efficacy of seeking redress for equality problems in the courts.

However, women have not chosen the courts as the sole forum in which to seek advancement of their equality. Women are pressing governments actively and continually for improvements in laws and programs. Nor can women conclude from

their experience that governments provide a better forum for their concerns; after all, governments, like the courts, are unrepresentative and too often unresponsive to women's needs. Because women's disadvantage is so entrenched, women do not have the luxury of choosing one forum over the other. The full support of both governments and the courts is needed for women to take their rightful place in Canadian society. Women must press for changes in both arenas.

It is our hope that the information provided in this study will draw new attention to the importance of access to the courts and of interpretations of equality that will positively affect the lives of women in Canada. If the Charter's guarantees are to be meaningful, governments must make them truly accessible to women and other disadvantaged groups; they cannot be available only to the rich. Also, governments must argue **for** women's interests in court, not against them. For their part, courts must be willing to listen, learn, and give the law its full effect.

The entrenchment of newly framed equality guarantees in the Constitution should be a positive step towards addressing the real conditions of inequality in Canada. However, if this positive step forward is to be taken, equality litigation cannot proceed as it has begun. A question is posed inescapably by the information revealed in this study: How real is Canada's commitment to equality for women?

"Women and Other Disadvantaged Groups"

In many places in this study, we use the phrase "women and other disadvantaged groups" to refer to all those who are disadvantaged by discrimination. Our general approach to the connections between women's sex inequality and other forms of inequality deserves some explanation here because the phrase forms a thread throughout the text.

Women are affected by many forms of discrimination. They are the subordinated sex; as well, they are victims of discrimination on the grounds of race, social status, disability, sexual orientation, religion, age, and marital status. Thus, women have an interest in the elimination of all forms of discrimination. For this reason, though we have focussed on the courts' treatment of cases in which sex equality has been argued, we have also discussed cases that deal with other forms of discrimination. This study groups the sex equality cases together to provide intensive analysis of them, but it also highlights cases from this period dealing with race, social status, disability, age, sexual orientation, marital status, and religion, and it notes where interpretive and practical issues affect all disadvantaged groups.⁶

We would have liked to explore more fully the application of the Charter's guarantees to the inequality of women who are discriminated against because of race, disability, or other grounds. Unfortunately, cases that challenge the particular complex of disadvantage experienced by women of colour or women with disabilities, for example, are virtually absent from the body of decisions. So far these cases are simply not reaching the courts. In the few cases that do involve poor women and lesbian women, sex equality arguments have not been advanced. This is also unfortunate because it means that the guarantees of sex equality are not being used by women to their full advantage. It also means that judges are not being presented

with women's unique experience of discrimination based on race, social status, disability, age, sexual orientation, marital status, or religion.

Although women's experience of discrimination because of race, disability, and other grounds is different from men's, women stand to be affected by all the cases dealing with these issues. For this reason we have included discussion of cases that deal with these other grounds, even where these cases have not been brought by women.

The interpretations of equality that we support in this study have been developed with women in mind. Because women are affected by many forms of discrimination, it is clear that to advance women fully, interpretations are required that can effectively address all forms of inequality. We believe that the interpretations we propose can do this.

The Contents of the Study

Chapter One of this study briefly describes women's condition — the inequality that the Charter guarantees were designed to address. It also discusses women's reasons for engaging in an intensive lobby to improve the Charter's language at the beginning of this decade. As well, the chapter documents women's experience when they made equality claims under the common law and the *Canadian Bill of Rights* and describes the elements of the equality guarantees for which women fought as a result of that experience.

In Chapter Two, section 15 — the main equality guarantee of the Charter — is examined. The language of the section and the concepts underlying it are considered as well as the historical, cultural, and legal context of the guarantee. Also, we propose interpretations that focus closely on the purpose of section 15.

Chapter Three describes the sex equality challenges to date, setting out their facts and outcomes. In addition, it describes equality arguments made on behalf of male litigants and by Attorneys General, as compared to those made on behalf of women litigants and by women intervenors.

Chapter Four reviews the equality theories being applied by the courts in the sex equality challenges, as well as how critical interpretive issues have been resolved; the meaning of sections 28 and 15(2), the relationship between sections 15 and 1, the Charter's scope, and the extent of the courts' remedial powers.

Chapter Five tells the story of who is using the Charter to do what. It discusses the whole body of equality cases, grouping the cases into subject matter categories, such as criminal cases, employment cases, and cases dealing with civil procedures. Brief descriptions of the issues and outcomes in these cases are provided, and some analytical trends are noted. This chapter also provides extensive statistical information: the number of decisions in each subject matter category, information concerning the grounds on which equality claims have been based, and the number of cases initiated by women and other disadvantaged groups.

In Chapter Six, we discuss the problem of access to the courts. In fact, two sets of problems are examined here: the legal questions of standing and intervenor status,

which determine who is entitled to be a participant in a court case; and the practical issue of who can afford to use the courts. The trends in decisions regarding standing and intervenor status are described, and the implications for women are examined. Also, funding and resources available to support equality rights litigation are outlined and their adequacy assessed.

Chapter Seven deals with the theory of formal equality and with the "similarly situate" and "reasonableness" tests. These are the analytical tools being used most often by the courts in equality rights cases. This chapter examines many different cases to explore the nature and effect of these tests. In particular, however, it is concerned with the capacity of these analytical tools to deal adequately with the equality claims of disadvantaged groups, such as women.

In Chapter Eight, the model of equality and the interpretive framework proposed in Chapter Two is expanded. The study concludes that a substantive model of equality is required if the Charter is to advance women's equality.

Endnotes

1. *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c. 11.
2. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, *supra*, note 1 [hereinafter Charter].

References in this book to the Charter's guarantees of equality are to ss. 15 and 28. These sections read:

15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

S. 28 came into force on 17 April 1982 with the other provisions of the Constitution. Because of a three-year moratorium, s. 15 did not come into effect until 17 April 1985.

3. See Appendix B for description of the decisions collected and methodology.
4. See Postscript: *Mark Andrews* for a discussion of *Andrews v. Law Society of British Columbia* (2 February 1989), (S.C.C.), [unreported].
5. A.C. Hutchinson and A. Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter" (1988), 38 *U.T.L.J.* 278; A.C. Hutchinson and P. Monahan, "Democracy and the Rule of Law" in A.C. Hutchinson and P. Monahan, eds., *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987) at 97-123; A.C. Hutchinson, "Charter Litigation and Social Change: Legal Battles and Social Wars" in R.J. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987); P.J. Monahan, "A Critic's Guide to the Charter" in R.J. Sharpe, ed., *Charter Litigation*; A. Petter, "The Politics of the Charter" (1986), 8 *Sup. Ct. L. Rev.* 473; A. Petter, "Legitimizing Sexual Inequality: Three Early Charter Cases" (unpublished, 7 October 1988).
6. In this text, the phrase "women and other disadvantaged groups" indicates that the issues affect all women and those men who experience discrimination based on race, disability, sexual orientation, religion, age, and other grounds. We do not include within the term "other disadvantaged groups" men claiming sex equality, because they are not disadvantaged, nor do we include individuals who are not members of disadvantaged groups, notwithstanding that any individual can be disadvantaged in an isolated circumstance. Finally, women who experience discrimination because of race or other grounds are not included within the scope of the term "other disadvantaged groups" because references to women in this book include all women.



**WOMEN, INEQUALITY,
AND THE CHARTER**

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Women's Condition: Inequality¹

The illusion that women have achieved equality is almost as pervasive as the reality of oppression.² Women's inequality is invisible because it is so ordinary, so massive, and so accepted. The failure to see women's inequality is not, however, simply the result of socially induced blindness. Not seeing it is useful; it serves the interests of those who are dominant. Perpetuating the myth that women have already achieved equality justifies doing nothing.

Yet the fact is that women, the majority of Canada's population, are severely oppressed. Women's lives are characterized by a lack of control over all the conditions of their lives, over their bodies, their sexuality, their homes, and their workplaces. They are devalued as human beings and exploited as workers, and they lack power in the institutions that govern them.

Women as a group are poorer than men. They work in ill-paid female ghettos, they do more part-time work, they have fewer job protections and less access to unionization, benefits, and pensions. Their gender determines the work they do and the pay they receive. Their sexuality is a commodity used for business purposes or as an invitation to harassment. Women of colour work in environments with the least legal and union protections — in sweat shops, private hospitals, and homes — and women with disabilities are chronically unemployed and underemployed.

Sixty per cent of single parent mothers are poor. They live well below the poverty line, trying to feed, clothe, and house their children on too little. Women and children who show the signs of economic and emotional strain come into the sphere of public "care". They are considered failures, they get labelled. Their lives are controlled by authorities, whether welfare or housing officials, hostel workers, or police. They suffer both material deprivation and loss of dignity, self-respect, and autonomy.³

Women are also victims of massive social violence.⁴ They are sexually abused as children, sexually assaulted as adults, and battered in their homes. These crimes are underreported because of women's economic dependence on the men who abuse them, and because of the further degradation involved in prosecution. Women are poorly protected from violence and poorly supported when they are the victims of it. Violence against women is sexualized in the form of pornography,⁵ which is big business. Also, violence against women is too often trivialized in the courts and sensationalized in the media, and women are both blamed for it and despised because of it.

Women's lack of control over their own bodies is also evident in their lack of reproductive freedom. Despite women's obvious interest in giving birth and their commitment to raising children, women are not considered appropriate decision-makers in this sphere; rather male-dominated groups are, whether they be legislators or doctors. Laws fetter women's right to make decisions regarding their own childbearing,⁶ and governments deny family planning and abortion services to girls and women by failing to provide resources.⁷ Now, new technologies threaten to increase, rather than diminish, the medical profession's control over reproduction.

When women have children they are whipsawed. Women are encouraged to have children, but as society's child-bearers and primary caregivers, they are penalized economically and devalued. Most women with children have to work outside the home because their families need their earnings to survive. Yet women's roles as child-bearers and parents are unacknowledged in the work force, or women are punished for them. Maternity leave and child-care services are inadequate, and when women spend time out of the work force to care for children, they get fewer promotions, less pay, and lower pensions. The unpaid labour of women who work in the home is invisible and without status. Far from being supported, when women have children, they become more vulnerable; they are more economically dependent, more likely to become poor, and less able to defend themselves against brutality and subordination.

Women also lack social and political power. As human beings they are less valued than men; they are considered less serious, less important, less credible, less legitimate, and less authoritative. Women are underrepresented in Canada's Parliament and legislatures, in the Senate, on city councils, on school boards, on courts, among senior civil servants, on boards of directors of corporations, among university presidents and faculty members, and on advisory boards. As a result, political, business, and research agendas do not reflect women's needs or values. Though women are more than half the population, they are marginalized in society. Women speak from the edges, from outside the centres of power.

Women's experience of inequality is also complex. It has commonality, but it is not homogeneous because women's experience of inequality differs depending on their race, class, age, religion, marital status, sexual orientation, and disability. Depending on which combination of groups women belong to, discrimination and inequality appear in different forms, and the perpetrators of it are different. Women experience both the common, deeply etched patterns of sex inequality and the complexity of that inequality when it is linked to and intermingled with every other form of discrimination.⁸

Discrimination against women in our society is massive. It is systemic, entrenched in all our institutions, and it affects all women. Though women's conditions have improved in some ways over the past two centuries, women's inequality persists. The discrimination women experience changes form, becomes more subtle, and continues. Women remain a social underclass, still denied equal status and equal power in society.

Women fought for new language in Canada's constitutional equality guarantees to shape law that could break with the past, address this inequality, and bring change to women's condition.

Breaking With the Past

At the beginning of this decade in Canada, women engaged in one of the major lobbies of the century to obtain new language in the equality provisions of the *Canadian Charter of Rights and Freedoms*. It was an historic moment. The gathering

political momentum to repatriate and renew the Constitution thrust women into an unprecedented fight to reshape the law on equality.

Women wanted change. First, women needed to establish a break with the courts' long history of failure to support women. For too long in Canada the courts had condoned and perpetuated women's inequality. Without new language in the Constitution that would signal a break with the past, women could expect only the old empty results.⁹

Second, women needed law that could address these deep and persistent inequalities, to bring an end to women's "lesser access to resources, privileges, credibility, legitimacy, authority, pay, bodily integrity, security, and protection . . ."¹⁰ Women fought for new equality guarantees that could work **for** them, that could bring change to their lives and the lives of their daughters.

Neither the common law¹¹ nor the *Canadian Bill of Rights*¹² had been a source of positive response to women's equality claims.¹³ For centuries, at common law, women were understood to be incapable of engaging in public life. Claims by women in both Canada and Great Britain to the same rights as men to vote, enter professions, and hold public office were rejected by the courts. When statutes specified that "persons" could engage in certain activities, this language was not interpreted by the courts to include women. Women were not persons and could be included in the scope of such statutes only by explicit provision.

This was the state of the law in Canada when the "Persons Case"¹⁴ was launched in 1928. The vote for women was not yet universal, and women were still fighting for admission to professions and the right to hold public office. To challenge their legal invisibility, five Alberta women claimed that women should be considered "qualified persons" who could be appointed to the Senate under section 24 of the *British North America Act, 1867*. The Supreme Court of Canada rejected this claim, but when it was appealed to the Privy Council in England, at that time the highest court for Canadians, the women won. The Privy Council ruled that the word "persons" was ambiguous and could include women.¹⁵

The failure of the courts to develop the common law to recognize women's equality rights continues in the present. In 1981, the Supreme Court of Canada ruled in the case of *Seneca College v. Bhadauria*¹⁶ that no claim of discrimination exists at common law. Bhadauria was a woman of East Indian origin who filed a private court action claiming damages for discrimination based on ethnic origin. The Supreme Court of Canada ruled that the Ontario *Human Rights Code*¹⁷ set out a comprehensive scheme for addressing discrimination and that complaints of discrimination must be dealt with under human rights legislation. Human rights laws foreclosed any common law tort¹⁸ of discrimination.

Judges found that the common law did not recognize discrimination, just as they had earlier found that it did not recognize women as persons. In short, the common law did not assist women with their equality claims in the past and offers little by way of positive precedent now. The history of the common law is a history of courts denying equality to women.

In 1960, Prime Minister John Diefenbaker introduced the *Canadian Bill of Rights*. In section 1(b), the Bill guarantees "equality before the law and protection of the law without discrimination because of . . . sex", among other grounds. Despite the fact that it explicitly guarantees equality, names sex as a prohibited ground of discrimination, and requires that all other federal laws be applied and interpreted in compliance with it, the *Canadian Bill of Rights* has been a dismal failure for women. Courts have interpreted it timidly, and the history of denying women's equality claims has continued.

From two key cases handed down in the 1970s, women learned too well that the equality protection in the *Canadian Bill of Rights* was also no source of support for their claims. These cases, now infamous, are *A.G. Canada v. Lavell*¹⁹ and *Bliss v. A.G. Canada*.²⁰

The first of these was a challenge by two women, Jeanette Lavell and Yvonne Bedard, to section 12(1)(b) of the *Indian Act*,²¹ which provided that Indian women who married non-Indians lost their Indian status, while Indian men who married non-Indians did not lose their status and, in fact, conferred Indian status on their non-Indian wives. Because of this provision, Lavell and Bedard had both lost membership in their bands and all the ensuing rights, including the right to own property and to live on their reserves. Lavell and Bedard alleged that this amounted to discrimination because of sex and violated their right to equality before the law.

The Supreme Court of Canada ruled that section 12(1)(b) of the *Indian Act* did not infringe section 1(b) of the *Canadian Bill of Rights* because "equality before the law" was a procedural guarantee only, a protection of equality in the administration of the law, and not a guarantee of equality in the substance of the law. Equality **before** the law was protected, but equality **under** the law was not. Justice Ritchie said. Apparently, as long as all Indian women were treated in the same discriminatory way, there was no violation of the *Canadian Bill of Rights*.^{22,23}

The second case involved a challenge to the *Unemployment Insurance Act*.²⁴ Stella Bliss was denied regular unemployment insurance benefits, even though she had worked the requisite number of weeks to qualify for them, because she was pregnant. Section 46 of the *Unemployment Insurance Act* stated that a pregnant woman could not claim regular unemployment insurance benefits in the fifteen weeks immediately surrounding the birth of her child. Denied regular benefits, Bliss could not qualify for unemployment insurance pregnancy benefits either. The *Unemployment Insurance Act* required a woman to have been employed for "ten or more weeks of insurable employment in the twenty weeks that immediately precede the thirtieth week before her expected date of confinement" in order to qualify for pregnancy benefits.²⁵ Because she did not meet this "Magic Ten" rule, Bliss could not get benefits at all. She was refused pregnancy benefits because she did not qualify and was refused regular benefits because she was pregnant. In both ways, Bliss was discriminated against because of her sex.

The Supreme Court of Canada ruled that Stella Bliss' right to equality before the law was not violated because the qualifications for entitlement to **benefits** were involved, and not the imposition of a penalty.

This is also the case from which emerged the wondrous logic that discrimination on the basis of pregnancy is not discrimination on the basis of sex, since the distinction being made is not between male and female persons, but between pregnant and non-pregnant persons.²⁶ The Court adopted the view that because not all women become pregnant, the distinction is not one based on sex. It overlooked the fact that only women become pregnant and that laws that discriminate against those who are pregnant discriminate against women.

The judgements in these two important cases stated that the language of the equality protection in the *Canadian Bill of Rights* was simply too narrow to support the claims that women brought forward; however, other interpretations of the language were possible.²⁷ Section 1(b) could have been interpreted so as to be meaningful for women, but it was not. The judges denied sex equality to women, and women learned that judges could not be trusted to accord fair, large, and liberal²⁸ interpretations to equality language if narrower interpretations were possible. Nor could they be trusted to come to sex equality cases with open minds or understanding. It seemed evident that new language and stronger guarantees would be required to direct the judges to new interpretations.

When the text of the proposed *Canadian Charter of Rights and Freedoms* was tabled in the House of Commons in 1980, women found that it repeated almost exactly the language of the *Canadian Bill of Rights*. The 1980 draft of the equality section of the Charter, section 15, read:

15.(1) Everyone has the right to equality before the law and to the equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age or sex.

(2) The section does not preclude any program or activity that has as its object the amelioration of conditions of disadvantaged persons or groups.²⁹

Section 15(2) was a significant new addition because it affirmed clearly that the equality envisioned by this section would require addressing conditions of disadvantage.

But women could not be satisfied with the repetition of the *Canadian Bill of Rights* language in the opening part of the guarantee. The Supreme Court of Canada had, after all, instructed women so forcefully that this language provided equality only with respect to procedures and penalties and could not assist women where laws themselves were discriminatory, or where programs were deemed to be "beneficial". The only change in section 15(1) relative to the *Canadian Bill of Rights* language was the addition of the word "equal" before protection. This was not reassuring because it appeared to invoke another unsatisfactory body of jurisprudence for women — the American courts' interpretations of the Fourteenth Amendment to the U.S. Constitution.^{30,31}

Through the next two years of constitutional conferences, committee hearings, and legal challenges, women lobbied strenuously³² to strengthen the Charter's guarantees of equality. They drew concepts and language from the more fertile source

of international and domestic human rights protections. They worked for changes to the language of section 15, insisting that equality **under** the law, which is what the Supreme Court said was missing in *Lavell*, and equal **benefit** of the law, which is what was apparently needed in *Bliss*, were included in 15(1). Women sought the inclusion of marital status, sexual orientation, and political belief in the list of named grounds of discrimination and supported open-ended protection from discrimination so that grounds other than those named could be covered. In addition, they attempted to strengthen the wording of section 15(2).³³

The final version of section 15 reads:

15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Women also lobbied successfully to obtain a specific women's equality rights section. Originally, it was proposed that a statement of purpose guaranteeing the rights and freedoms in the Charter to men and women equally should be included in section 1 of the Charter.³⁴ Women were interested in this for several reasons. The results in the sex equality cases under the *Canadian Bill of Rights* indicated that any new equality guarantees should include specific and explicit direction on the subject of women's equality, because it appeared that any uncertainty in language could lead to women's claims being denied again. Women wished to establish that their sex equality claims would be treated with utmost seriousness by the courts, and to ensure that they would not be dealt with less seriously than other claims, such as those based on race.³⁵

In addition, women wished to ensure that the limits on rights allowed in section 1 of the Charter could not limit women's right to equality. Section 1 provides that rights can be limited where the limits are reasonable and demonstrably justified in a free and democratic society. Women, and others, felt that the wording of this section was very broad and markedly different from the international standard for such abrogation clauses set by the *International Covenant on Civil and Political Rights*. Article 4 of that Covenant allows for limits on protected rights only in times of national emergency, and only when the limits do not involve discrimination solely because of sex, among other grounds.³⁶

Finally, women wanted to be sure that section 27, the multiculturalism clause, would not limit women's sex equality either. Section 27 instructs that the Charter should be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians. Because cultural values are often used to justify discrimination against women, the fear was that section 27 could be used

to undermine women's equality. The statement of purpose regarding the equality of men and women was intended to ensure that any cultural practice that discriminated on the basis of sex would not survive Charter review.

However, the guarantee of equality between the sexes did not become a part of section 1 of the Charter. Instead, in the April 21, 1981 version of the Charter,³⁷ it became section 28, stating then, as it does today:

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.³⁸

The history of women's efforts took one further turn, however. In 1981 the Supreme Court of Canada ruled that, although the federal government could repatriate the Constitution unilaterally, there was a convention that provinces should agree to constitutional reform.³⁹ In response, the Prime Minister convened a federal-provincial conference of First Ministers on November 2, 1981.

At this conference, Canada's First Ministers, with the exception of Premier René Lévesque of Quebec, agreed to a new clause, section 33, which would give any government the power to override the rights in the Charter, including the equality rights in sections 15 and 28. An extraordinary compromise, this appeared to be the way to have an entrenched *Canadian Charter of Rights and Freedoms* and not have it, all at the same time. Rights would be guaranteed, but governments could override them at any time by passing an act explicitly abrogating them.⁴⁰

Women's response was a lobby redoubled in strength. They were unsuccessful in having section 33 removed from the Constitution, but on November 24, 1981 the then Minister of Justice, Jean Chrétien, announced that the provinces and the federal government had agreed to remove the application of the override clause from section 28.⁴¹

The importance of women's efforts during this period cannot be overstated. Men were negotiating a new Constitution, which would be very difficult to amend. It contained entrenched rights clauses that would affect women in Canada for decades to come. Equality guarantees worded in the old way had been emptied of meaning by judges,⁴² and politicians could not be trusted to negotiate new protections that would be effective. Though outsiders to the process, women injected themselves forcefully into the constitutional debates, arguing with one voice for strengthened, expansive guarantees that could bring real change to the lives of women in Canada.⁴³

Women argued with passion for new rights because they needed law that broke with the dismal record of the past, law that could address effectively their persistent inequality. The result was two equality guarantees, sections 15 and 28, both different from those in the *Canadian Bill of Rights* and both importantly crafted by women.

Endnotes

1. Sources of information for this section include:

Canada, *Report of the Commission on Equality in Employment* (Ottawa: Supply and Services Canada, 1984) (Commissioner: R.S. Abella);

Canada, *Sexual Offences Against Children: Report of the Committee on Sexual Offences Against Children* (Ottawa: Supply and Services Canada, 1984);

Canada, Labour Canada, *Women in the Labour Force, 1986-87* (Ottawa: Supply and Services Canada, 1987);

Canada, National Council of Welfare, *Poverty Profile 1988* by K. Battle (Ottawa: Supply and Services Canada, 1988);

Canada, *Part-time Work in Canada: Report of the Commission of Inquiry into Part-time Work* (Ottawa: Labour Canada, 1983);

M. Eichler, "The Elusive Ideal — Defining Equality" (unpublished paper, prepared for the *Canadian Human Rights Yearbook*, 1988);

L. MacLeod, *Battered But Not Beaten . . . Preventing Wife Battering in Canada* (Ottawa: Canadian Advisory Council on the Status of Women, 1987);

S. Torjman, *The Reality Gap: Closing the Gap Between Women's Needs and Available Programs and Services* (Ottawa: Canadian Advisory Council on the Status of Women, 1988).

2. We are indebted to one of our reviewers for this sentence.
3. See H. Echenberg and B. Porter, "Poverty Stops Equality, Equality Stops Poverty: The Case for Social and Economic Rights" in D. Williams and P. File, eds., *Human Rights in Canada — Into the 1990s and Beyond* (Ottawa: University of Ottawa Press, forthcoming).
4. The pervasiveness of violence against women is confirmed by the 3 January 1989 announcement by U.S. Surgeon General C. Everett Koop that violence against women is a major public health problem. Koop launched a new campaign designed to provide information to doctors to assist them in identifying women who are victims of violence. Canadian studies (see L. MacLeod, *Battered But Not Beaten . . .*, *supra*, note 1) show that this problem is of similar proportions in Canada.
5. See C.A. MacKinnon, "Making Sex Equality Real" in L. Smith et al., eds., *Righting the Balance: Canada's New Equality Rights* (Saskatoon: Canadian Human Rights Reporter, 1986) at 40.
6. Both Progressive Conservative and Liberal politicians have supported the introduction of a new abortion law, following the 28 January 1988 decision of the Supreme Court of Canada that s. 251 of the *Criminal Code* is unconstitutional (*R. v. Morgentaler* (1988), [1988] 1 S.C.R. 30). While there is little apparent agreement on what the content of the law should be, it is clear that the majority of Canadian politicians do not wish to allow women to control their own reproduction. Although a new law is wholly unnecessary, women may find their reproductive freedom fettered again in the near future.

7. Despite the 28 January 1988 decision of the Supreme Court of Canada, which made abortion legal, women in many parts of Canada still do not have access to abortion services. A number of governments have attempted to obstruct access by refusing to pay for abortions under provincial health plans, refusing to support abortion services provided in private clinics, and allowing hospitals to refuse to provide these services to women. In recent years, governments have also refused or cut back funding to respected family planning and health information services for women.
8. For an excellent discussion of the relationship between women's sex equality and the other forms of inequality that women experience, see M. Kline, "Race, Racism and Feminist Legal Theory", presented at the "Workshop on Feminism, Critical Theory, and the Canadian Legal System", June 4-7, 1988, Faculty of Law, University of Windsor.
9. See B. Baines, "Women, Human Rights and the Constitution" in A. Doerr and M. Carrier, eds., *Women and the Constitution in Canada* (Ottawa: Canadian Advisory Council on the Status of Women, 1981) at 45.
10. See C.A. MacKinnon, "Making Sex Equality Real", *supra*, note 5 at 40.
11. The common law means the body of judge-made law that has developed through years of decisions and accumulated precedent. The common law is distinct from government-made law, which appears in statutes and regulations and, in Canada, in the Constitution.
12. S.C. 1960, c. 44, reprinted in R.S.C. 1970, App. III.
13. See B. Baines, "Women and the Law" in S. Burt, L. Code, and L. Dorney, eds., *Changing Patterns: Women in Canada* (Toronto: McClelland and Stewart, 1988) at 157-183, for further discussion of the two clusters of cases outlined here.
14. *In the Matter of a Reference in the meaning of the word "Persons" in s. 24 of the British North America Act, 1867* (1928), [1928] S.C.R. 276.
15. The brief description of women's legal history given in this paragraph and the previous one relies on detailed accounts given in M. Eberts, "Women and Constitutional Renewal" and B. Baines, "Women, Human Rights and the Constitution" in *Women and the Constitution in Canada*, *supra*, note 9 at 7-8 and 33-37.
16. (1981), [1981] 2 S.C.R. 181.
17. R.S.O. 1970, c. 318, as amended by 1971 (Ont.), c. 50, s. 63; 1972 (Ont.), c. 119 and 1974 (Ont.), c. 73.
18. A tort is an act recognized by courts as a legal wrong. *Black's Law Dictionary* defines it as: "a private or civil wrong or injury, other than a breach of contract, for which the court will provide a remedy in the form of an action for damages". *Black's Law Dictionary*, 5th edition (St. Paul, Minn: West Publishing Co., 1979) at 1335.
19. (1973), [1974] S.C.R. 1349 [hereinafter *Lavell*].

20. (1978), [1979] 1 S.C.R. 183 [hereinafter *Bliss*].
21. R.S.C. 1970, c. I-6.
22. Detailed treatment of these cases is given in B. Baines, "Women, Human Rights and the Constitution", *supra*, note 9.
23. Lavell and Bedard subsequently filed a complaint against Canada under the *International Covenant on Civil and Political Rights*. The United Nations Human Rights Committee found that Canada was in violation of Article 27 of the Covenant because Lavell and Bedard were denied access to the cultural life of their tribes. In a subsequent complaint filed by Sandra Lovelace, another Indian woman who lost her right to live on her reserve because of s. 12(1)(b) of the *Indian Act*, the U.N. Committee also ruled against Canada. For discussion of the protections afforded by the International Covenant and their application to the cases presented by Indian women, see A.F. Bayefsky, "The Human Rights Committee and the Case of Sandra Lovelace" (1982) 20 *Can. Y.B. Int'l L.* 244.
24. *Unemployment Insurance Act, 1971*, S.C. 1970-71-72, c. 48, s. 46.
25. *Ibid.*, c. 48, s. 30(1). Ss. 30(1) was repealed in 1983.
26. This opinion of the Supreme Court of Canada, that discrimination because of sex does not encompass discrimination because of pregnancy, is still causing problems for women in Canada ten years later. Because of it, there has been uncertainty in human rights cases. Originally, human rights laws prohibited discrimination because of sex, but contained no specific prohibition against discrimination because of pregnancy. The *Bliss* case created uncertainty about whether pregnancy would be covered by the sex prohibition, so some jurisdictions amended their laws specifically to include protection from discrimination because of pregnancy. However, not all jurisdictions have done this. In a recent Manitoba case, the Manitoba Court of Appeal ruled that the provisions in the *Manitoba Human Rights Act* prohibiting discrimination because of sex did not prohibit discrimination because of pregnancy. This case, *Brooks v. Canada Safeway Ltd.* (1986), 7 C.H.R.R. D/3475 (Man. C.A.), was heard on appeal by the Supreme Court of Canada on 15 June 1988. The Supreme Court of Canada has the opportunity to reverse *Bliss* in its decision on this case. Manitoba amended its legislation in 1987 to specifically include a prohibition against discrimination on the basis of pregnancy: *The Human Rights Code*, S.M. 1987, c. 45.

[Editor's note: The Supreme Court of Canada effectively overruled its decision in *Bliss* in a 4 May 1989 judgement in *Brooks v. Canada Safeway Ltd.* In a unanimous judgement, Chief Justice Dickson wrote:

Over ten years have elapsed since the decision in *Bliss*. During that time there have been profound changes in women's labour force participation. With the benefit of a decade of hindsight and ten years of experience with claims of human rights discrimination and jurisprudence arising therefrom, I am prepared to say that *Bliss* was wrongly decided, or, in any event, that *Bliss* would not be decided now as it was then.]

27. See B. Baines, "Women and the Law", *supra*, note 13. In her discussion of the *Canadian Bill of Rights* cases, Ms. Baines argues that these decisions are evidence of judicial bias against women rather than evidence of flaws in the language of the law.
28. See the discussion of the interpretation of human rights legislation in *Canadian National Railway Co. v. Canada* (1987), [1987] 1 S.C.R. 1114 at 1132-1138.
29. R. Elliot, "Interpreting the Charter — Use of the Earlier Versions as an Aid" [1982] *U.B.C. L. Rev. Charter Edition* 11.
30. See Lynn Smith's discussion of the paradigmatic case under the Fourteenth Amendment in "A New Paradigm for Equality Rights" in *Righting the Balance*, *supra*, note 5 at 363-366. The Fourteenth Amendment guarantees equal protection of the law to all. No specific grounds of discrimination, such as race or sex, are named. However, the Fourteenth Amendment came into being after the U.S. Civil War and was intended to eliminate discrimination against Blacks. Ms. Smith argues at 365:

... that the success of the equal protection clause in the Fourteenth Amendment has been measured largely in terms of its ability to deal with racial discrimination. There is nothing in the wording of the Fourteenth Amendment to suggest that scale of measurement, but the context in which it was enacted leads to that consequence. One commentator has speculated that (at an unconscious level, perhaps) judges have had the paradigm of racial discrimination in mind whenever equal protection cases have come before them. Other groups seeking to use the Fourteenth Amendment as a meaningful equality guarantee have found that their success depended upon the similarity to race of the characteristics on the basis of which they were singled out. Only insofar as other characteristics were like race were they seen as worthy of Fourteenth Amendment protection.
31. For discussion of the addition of the word "equal" to the guarantee of "protection of the law" and its invocation of jurisprudence relating to the Fourteenth Amendment of the U.S. Constitution, see B. Baines, "Women, Human Rights, and the Constitution" *supra*, note 9 at 51-53, and Submission of the Canadian Advisory Council on the Status of Women to the Special Joint Committee on the Constitution of Canada, "Women, Human Rights, and the Constitution", November 18, 1980 (1981) 2 C.H.R.R. C/35.
32. See *infra*, note 43.
33. See Appendix VII, "Summary of those Resolutions passed at the Ad Hoc Conference on Women and the Constitution" in A.F. Bayefsky and M. Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) at 639-641. Though women supported the open-endedness of s. 15 as proposed in the 12 January 1981 version of the Constitutional Resolution, they lobbied unsuccessfully for the inclusion of marital status, sexual orientation, and political belief in the list of named grounds. They felt it was important to obtain an express statement that discrimination on those grounds would not be tolerated. The Ad Hoc Conference also called for a two-tier test in s. 15. It was resolved that, in the first tier, s. 15 should prohibit discrimination on the grounds of sex, race, religion, colour, national or ethnic origin, mental or physical disability, age, marital status, sexual orientation, and political belief. In the second tier,

s. 15 should require a compelling reason for **any distinction** based on sex, race, religion, colour, national or ethnic origin, sexual orientation, or political belief.

Lastly, the Ad Hoc Conference called for the ameliorative programs referred to in s. 15(2) to apply only to disadvantaged groups as listed in 15(1) and not to individuals, since the only basis on which individuals should qualify for the benefits of such programs is by membership in a disadvantaged group.

34. *Ibid.* at 635-637 and 642-644.

35. One of the very few successful *Canadian Bill of Rights* cases was *R. v. Drybones* (1969), [1970] S.C.R. 282. In this case, the Supreme Court of Canada found that s. 94(b) of the *Indian Act*, R.S.C. 1952, c. 149, s. 94(b), offended 1(b) because it made drinking in the home an offence for Indians, when it was not an offence for non-Indians. The argument in *Drybones* was similar to the argument in *Lavell*, *supra*, note 19. In both cases it was argued that treating one group more harshly than another in law, because of race/sex, violated the guarantee of equality before the law. Although "equality before the law" was a sufficient guarantee to deal with an inequity in law for *Drybones*, it was insufficient for *Lavell* and *Bedard*. It appeared that the court would strike down race discrimination, but not sex discrimination. Women in Canada were also aware of the experience of women in the United States with interpretation of the U.S. Constitution. As Lynn Smith points out, in "A New Paradigm for Equality Rights", *supra*, note 30, race is the paradigmatic case through which equality is understood in U.S. constitutional law. Because women's equality cases are not always analogous to racial equality cases, sex equality cases have not fared as well. U.S. courts have treated sex equality cases as less important, and women's equality claims have often failed because of this judicial approach.

36. See United Nations, *International Covenant on Civil and Political Rights*, Article 4 in *Human Rights: A Compilation of International Instruments* (New York: 1983) at 8.

37. See R. Elliot, "Interpreting the Charter", *supra*, note 29 at 15 and 52.

38. This wording is similar to Article 3 of the *International Covenant on Civil and Political Rights*, *supra*, note 36. Article 3 reads:

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

39. See *A.G. Manitoba v. A.G. Canada* (1981), [1981] 1 S.C.R. 753 [sub nom. *Reference Re Amendment of the Constitution of Canada* (Nos. 1, 2 and 3)].

40. Ken Norman and Donna Greschner discuss the ramifications of s. 33 in their article "The Courts and Section 33" (1987), 12 *Queen's L.J.* 155.

41. The history of the lobby over s. 28 is told in detail by Penney Kome in P. Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution* (Toronto: Women's Press, 1983).

42. B. Baines, "Women and the Law", *supra*, note 13 at 171.

43. For excellent accounts of the women's lobby on the Charter, see Mary Eberts, "Sex-based Discrimination and the Charter" in *Equality Rights and the Canadian Charter of Rights and Freedoms*, *supra*, note 33 at 183; C. Hosek, "Women and Constitutional Process" in K. Banting and R. Simeon, eds., *And No One Cheered: Federalism, Democracy and the Constitution Act* (Toronto: Methuen, 1983) at 280; C. Hosek, "How Women Fought for Equality" in G.H. Nemiroff, ed., *Women and Men: Interdisciplinary Readings on Gender* (Toronto: Fitzhenry and Whiteside, 1987); K.J. de Jong, "Sexual Equality: Interpreting Section 28" in *Equality Rights and the Canadian Charter of Rights and Freedoms*, *supra*, note 33 at 493; and P. Kome, *supra*, note 41.



**INTERPRETING SECTION 15
OF THE CHARTER**

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Introduction

Women's successful lobby to expand and strengthen the wording of section 15 and to gain the inclusion of section 28 was a crucial step towards making the Charter into law that would be useful to women. But it was just the first step. Laws are not self-implementing, nor are they self-interpreting. For the Charter to make a positive difference in women's lives, women will have to use it, and judges will have to adopt certain interpretations and reject others. This chapter is about the next step, the interpretation of section 15 — the main equality clause in the Charter.

A fundamental principle of statutory interpretation is that a law should be interpreted in light of its purpose. Moreover, the Supreme Court of Canada has highlighted the importance of purpose in the interpretation of Charter provisions by stating that the proper approach to the interpretation of Charter rights and guarantees is a purposive one.¹

Because there was a three-year moratorium on section 15 between 1982 and 1985, section 15 did not come into effect until April 17, 1985. As a result, the first section 15 appeals are only now reaching the Supreme Court of Canada. Cases involving other Charter provisions reached the Supreme Court much sooner. Therefore, even though the highest Court has not yet interpreted section 15, there is already a body of jurisprudence providing guidance concerning the approach to be taken in interpreting Charter rights. The elements of a purposive approach were articulated in *Big M Drug Mart*, a freedom of religion case, in which Justice Dickson (now the Chief Justice) said:

... the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*.²

It is, then, consistent with principles of statutory interpretation and with Charter rulings of the highest Court that a purposive approach be taken to the interpretation of section 15. To ascertain the purpose of section 15 it is necessary to look to both contextual and textual sources, as was done in *Big M Drug Mart*.

To determine what a purposive approach reveals about section 15 we will apply the elements articulated in *Big M Drug Mart*, examining:

- the character and larger objects of the Charter;
- the historical origins and text of section 15; and
- the meaning and purpose of associated Charter rights and freedoms.

We will argue that:

- the larger objects of the Charter include the fulfilment of Canada's international human rights obligations and the amelioration of group disadvantage;

- the constitutional status, history, and text of section 15 reflect an intention on the part of the drafters to go beyond the narrow interpretations of equality rendered under the *Canadian Bill of Rights* and an intention to continue the twentieth-century trend of increasing human rights protections for disadvantaged groups; and
- section 28 reinforces the Charter's guarantee of equality to women.

Taken together, these sources demonstrate that the primary purpose of section 15 is to assist disadvantaged groups such as women to overcome their inequality of condition.

The Character and Larger Objects of the Charter

International Human Rights Obligations

One of the key objects of the Charter is to implement Canada's obligations under international human rights instruments, such as the *International Covenant on Civil and Political Rights* and the *Optional Protocol* thereto,³ and the *International Covenant on Economic, Social and Cultural Rights*.⁴ This fact is ascertainable from the writings of legal scholars and from the minutes of proceedings and evidence of the Special Joint Committee of the Senate and House of Commons on the Constitution.⁵ One scholar, John Claydon, states that:

Canada's international human rights obligations served as not only the necessary and pervasive context in which the Charter of Rights was introduced and adopted, but also as the direct inspiration for amendments designed to strengthen the human rights protection provided.⁶

Similarly, Bill Black and Lynn Smith state that "s. 15 is a primary vehicle for implementing Canada's obligations under those [international] instruments".⁷ During the hearings of the Special Joint Committee on the Constitution, the then federal Minister of Justice, Jean Chrétien, said:

... the rights that we have agreed upon in international agreements should be reflected in the laws or the Charter of Rights that we will have in Canada.⁸

These words have been quoted in case law, and international human rights law has been applied to interpret Charter provisions on a number of occasions.⁹ Chief Justice Dickson has stated, in a judgement on the interpretation of freedom of association guaranteed under the Charter, that

... the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.¹⁰

Although Dickson was dissenting in this case, the majority judgement does not contain any express disagreement on the issue of the relevance of international law.

In addition to the instruments mentioned above, other instruments relevant to the interpretation of section 15 include the *Universal Declaration of Human Rights*,¹¹ a resolution of the General Assembly of the United Nations adopted without dissenting vote in 1948; the *International Convention on the Elimination of All Forms of Discrimination Against Women*,¹² to which Canada became a signatory in 1982 after the Charter came into force; and the *European Convention on Human Rights*,¹³ to which Canada is not a signatory though many Western European countries with comparable legal systems are.

We do not suggest that all international human rights law can be applied automatically and unthinkingly to section 15 cases. In fact, as John Claydon points out, care must be taken to ensure that international and comparative sources are not used inappropriately to circumscribe human rights protections.¹⁴ However, we do suggest strongly that section 15 is an expression of the egalitarian values embodied in international human rights instruments.

For purposes of this discussion we have grouped together, under the term "human rights", international instruments that have been designated variously as being about civil, political, economic, social, and human rights. This is based in part on common usage but more significantly, we think it is appropriate and important to look at these rights as a whole. Taken together, the international rights instruments reflect a clear commitment to recognizing the inherent dignity and worth of persons and to the goal of reducing the inequality of disadvantaged groups such as women.

It follows that these values are also embodied in section 15, and that section 15 is intended, therefore, to promote respect for the inherent dignity and worth of persons and the substantive equality of disadvantaged groups such as women. By substantive equality we mean not simply equality in the form of law (formal equality), but equality in the actual conditions of women's lives.

Support for our contention that rights to respect for dignity and worth are tied to rights to substantive equality is suggested by a 1977 resolution of the United Nations General Assembly, which states:

- (a) All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights;
- (b) The full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible; and the achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development; and
- (c) All human rights and fundamental freedoms of the human person and of peoples are inalienable.¹⁵

Similarly, in the preamble to the *International Covenant on Economic, Social and Cultural Rights*, it is recognized expressly that human rights derive from the inherent dignity of the human person and that the ideal of free human beings can

be achieved only if conditions are created whereby everyone may enjoy economic, social, cultural, civil, and political rights.

The Amelioration of Conditions of Disadvantage

One of the strongest supports for the view that section 15 is intended to promote the substantive equality of disadvantaged groups is provided by section 15(2) of the Charter. Section 15(2) authorizes laws, programs, or activities designed to ameliorate conditions of disadvantage for members of disadvantaged groups. The grounds of race, national or ethnic origin, colour, religion, sex, age, and mental and physical disability are mentioned specifically.

Section 15(2) should ensure that affirmative action programs are not deemed to be discriminatory because they treat members of a disadvantaged group more favourably than others in order to overcome the effects of past discrimination. In the United States, affirmative action programs have been challenged by white males alleging they received less favourable treatment than women and minorities.¹⁶ Section 15(2) provides an answer to such challenges should they arise in Canada. However, more importantly, section 15(2) clarifies the meaning of equality in 15(1) and, along with other Charter provisions, affirms that the achievement of an egalitarian society is an object of the Charter.¹⁷

It is possible to read sections 15(1) and 15(2) as contradictory provisions, as the Manitoba Court of Appeal did in *Apsit*.¹⁸ The Court held that a Manitoba government program to give Aboriginal persons and Indian bands first option on permits to harvest wild rice constituted an automatic violation of section 15(1), even though it might be defended under section 15(2). Section 15 is more cogent, however, when read as a whole with parts that complement rather than contradict each other.¹⁹ An interpretation of sections 15(1) and 15(2) that assumes they are contradictory also assumes that treating everyone the same is the norm of equality although special treatment may be justified in certain circumstances. On the other hand, reading sections 15(1) and 15(2) as a whole assumes that equality is **not** merely or even primarily a matter of same treatment, but rather a matter of addressing and overcoming the disadvantage of historically oppressed and excluded groups. Because the latter interpretation can better address the reality of inequality, it is one that better fits the purpose of section 15.

Let us use a hypothetical sex equality case to illustrate the difference between contradictory and complementary readings of these sections. The Saskatchewan *Labour Standards Act* provides that the Minimum Wage Board may order employers to pay taxi fares for travel home for women who work after midnight.²⁰ This provision could be challenged under section 15 by men because employers are not required to pay men's taxi fares. It could be interpreted to be a violation of section 15(1) because men do not receive the same treatment, but could be "saved" under 15(2) as a law designed to ameliorate a condition that disadvantages women, in this case the fact that they are more often the victims of sexual attack. Alternatively, the provision could be found not to be a violation of section 15(1) precisely because it is designed to ameliorate the conditions of disadvantage of women; this, surely, is the purpose of the equality guarantee.

A word of caution is warranted, however. A danger for disadvantaged groups is that section 15(2) will be used to justify programs that undermine equality on the grounds that they are "ameliorative". This danger may be of particular concern to women and men who have disabilities. For example, the possibility exists that section 15(2) will be invoked to rationalize the ghettoization of persons with disabilities in sheltered workshops, even though sheltered workshops perpetuate treatment of disabled workers as an underclass with no minimum wage, labour standards, or workers' compensation protections. Some may argue that sheltered workshops ameliorate the conditions of unemployment of persons with disabilities and provide job training.²¹ However, only activities that demonstrably advance equality, rather than ones that entrench second-class status, should be recognized as deserving the protection of sections 15(1) and (2).

The Court's interpretation of the interaction between sections 15(1) and (2) will be very important. However, there can be no question that section 15(2) indicates that the amelioration of disadvantage is central to the purpose of section 15, and that it is the conditions of disadvantage, not merely distinctions in the form of law, which the equality guarantee is intended to address.

The Constitutional Character of the Charter

The fact that the Charter is a constitutional document is an important aspect of its character. The Charter's constitutionality enhances the importance of the equality value expressed in it, and it increases the power of the courts to enforce rights clauses against governments. This is crucial because of the history of judicial reluctance to enforce rights clauses against government, particularly evident in cases decided under the *Canadian Bill of Rights*. In Chapter One we delineated the difficulties that women faced in attempting to enforce equality rights under the Bill. In fact, almost all equality rights cases decided under this 1960 federal statute failed; the one notable successful case was *R. v. Drybones*.²² As noted previously, this case challenged the provisions of the *Indian Act*²³ which made it an offence for Indians to be intoxicated in their own homes "off reserve", though it was not an offence for non-Indians, who were prohibited only from being intoxicated in a "public place".

Among the equality cases under the Bill that failed were the following in which the courts found that section 1(b) was not violated by:

- reducing the size of juries in the Northwest Territories from twelve to six (*R. v. Pudlock*);²⁴
- permitting an indeterminate sentence to be imposed on offenders under 22 years of age in British Columbia, although it could result in a sentence longer than the maximum in the *Criminal Code*²⁵ (*R. v. Burnshine*);²⁶
- defining boys as children to age 16 and girls as children to age 18, by operation of the *Juvenile Delinquents Act*²⁷ in the province of Alberta (*R. v. Mackay*);²⁸
- denying rights to a preliminary hearing and trial by jury to young offenders (*R. v. K.G.*);²⁹

- limiting the collective bargaining rights of federal public servants (*Public Service Alliance of Canada v. R.*).³⁰

One of the reasons that so many equality cases under the Bill failed is that courts applied a very superficial standard of judicial review to such cases, usually asking only whether a challenged provision had been enacted for the purpose of achieving a "valid federal objective" or, as in *Mackay v. R.*, whether

... such inequality as may be created by legislation affecting a special class — here the military — is arbitrary, capricious, or unnecessary, or whether it is rationally based and acceptable as a necessary variation from the general principle of universal application of law to meet special conditions and to attain a necessary and desirable social objective.³¹

In Charter cases, the Supreme Court of Canada has distinguished *Canadian Bill of Rights* interpretations on the basis that the Bill was not a constitutional document. For example, in *Therens*, Justice LeDain said:

[I]t is also clear that the Charter must be regarded, because of its constitutional character, as a new affirmation of rights and freedoms and of judicial power and responsibility in relation to their protection ... on the whole, with some notable exceptions, the courts have felt some uncertainty or ambivalence in the application of the *Canadian Bill of Rights* because it did not reflect a clear constitutional mandate to make judicial decisions having the effect of limiting or qualifying the traditional sovereignty of Parliament.³²

In *R. v. Whyte*, a case involving the Charter right to be presumed innocent, Chief Justice Dickson said:

Although the principles set out in the *Canadian Bill of Rights* are of great importance (many of them having been re-enacted in the Charter), a constitutional document is fundamentally different from a statute ... An interpretation of section 11(d) that would make the presumption of innocence subject to legislative exceptions would run directly contrary to the overall purpose of an entrenched constitutional document.³³

Thus, there should be no question as to the legitimacy of judicial review under section 15 of the Charter. Neither should the deference to legislative intent that characterized equality rights decisions under the Bill be perpetuated in decisions under section 15 of the Charter.³⁴

It must be noted, however, that the extent to which the traditional sovereignty of the legislatures has been limited or qualified is an open question.³⁵ Section 33 of the Charter allows legislatures to override Charter rights for five-year periods, provided they do so expressly in relation to each provision they wish to exclude from Charter review. At the date of writing, the provinces of Quebec, Alberta, and Saskatchewan had invoked the override.

Historical Origins and Text of Section 15

There is much in the historical origin of section 15 and its language to offer further guidance as to the meaning of its contents. In broad historical terms, section 15 can be seen as part of a trend in Western democracies towards increased recognition of human worth and dignity and greater commitment to reducing the inequality of disadvantaged groups.³⁶ This trend is expressed through reforms in family laws to increase women's rights, "ombudsman" legislation, consumer protection laws, employment standards legislation, and human rights statutes.

Human Rights Protections

Just as human rights protections provide insight into the character and larger objects of the Charter, they also form an important part of the historical origins of section 15.

Section 15 of the Charter is not Canada's first effort to fulfil its international human rights obligations, but rather one of its most recent. In the past thirty to forty years, Canadians have witnessed the enactment of domestic human rights statutes at the federal level and in every province and territory.³⁷ The preamble to the Ontario *Human Rights Code* illustrates the clear connection between Canada's international obligations and its domestic human rights legislation. That preamble states:

WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations . . .³⁸

Early anti-discrimination initiatives in Canada included British Columbia's 1931 *Unemployment Relief Act*, Ontario's 1932 *Insurance Act*, Manitoba's 1934 *Libel Act*, British Columbia's 1945 *Social Assistance Act*, and Saskatchewan's 1947 *Bill of Rights*.³⁹ After World War II there was a dramatic increase in human rights activity in Canada and around the world. The revelation that millions of Jews, members of ethnic minorities, political dissidents, people with physical and mental disabilities, and homosexuals had been stripped of their property, ghettoized, imprisoned, forced into labour camps, and murdered by the Nazis and their collaborators during the War had a profound impact on the social conscience of Western societies. The democratic majority could be wrong, devastatingly wrong, and protections for those most likely to be the targets of an intolerant majority were needed.

The Holocaust inspired the members of the United Nations to draft the *Universal Declaration of Human Rights*. Activities in Canada included the gradual repeal of discriminatory laws and a reduction in blatantly racist practices. Restrictive covenants forbidding the sale of property in certain areas to "Jews and persons of other objectionable nationality" were revoked. Segregated schools for Blacks and Indians gradually disappeared, as did segregated swimming pools and special sections in theatres and restaurants for non-whites. Bars on the entry of Jews and non-whites into certain professions were dropped. Japanese-Canadians, Inuit, Indo-Canadians,

Doukhobours, and finally Indians⁴⁰ were given the vote for the first time in Canada during this post-war period.

Fair employment practices and fair accommodation acts,⁴¹ which prohibited discrimination on the basis of race and religion, were introduced in the 1950s. These early measures were designed to ensure that racial and religious minorities could not be denied the practical necessities of daily life — work, shelter, access to public services and public places — as Jews and others had been in Europe during the 1930s and 1940s.

At approximately the same time, and also as a result of the World War II experience, Canada began to introduce equal pay laws prohibiting employers from paying women less than men for performing the same work.

The human rights commissions and the tribunal system of adjudicating human rights complaints that are established in contemporary human rights statutes represent a consolidation and expansion of the fair employment practices and fair accommodation laws. Consolidated human rights statutes have been in effect in all Canadian jurisdictions except the Territories⁴² for at least ten years.

At first, human rights statutes did not contain prohibitions against sex discrimination. Over the years, grounds of discrimination have been added, extending the original prohibitions against discrimination because of race and religion, to cover sex, age, marital status, disability, and, in some jurisdictions, criminal record, political belief, family status, and sexual orientation.⁴³

The history of human rights jurisprudence in Canada also reflects a growing commitment to egalitarian values. This commitment is manifest in the decisions of tribunals and courts concerning the meaning of discrimination and the types of remedies available to complainants. Whereas initially discrimination was understood to be a question of malicious intent, tribunals and courts have gradually shifted away from an intention requirement to focus on harmful effects. In 1985, in *Ontario Human Rights Commission v. Simpsons-Sears*,⁴⁴ the Supreme Court ruled that discrimination need not be intentional to violate human rights protections and that policies or practices that have an adverse effect on a protected group contravene the law.

In a similar vein, it has been held that different treatment is warranted where the same treatment will produce unequal effects for members of disadvantaged groups.⁴⁵

In *Canadian National Railway Co. v. Canada*,⁴⁶ known as the Action Travail des Femmes case, it was held that, in a case of systemic discrimination, a systemic remedy is appropriate. The Human Rights Tribunal found that CN Rail had systematically discriminated against women seeking blue-collar jobs. As a remedy, CN Rail was required to hire at least one woman in every four new hires until the representation of women in its blue-collar jobs matched the national level of women's representation in such jobs (13 per cent). This remedy was disputed by CN Rail. On appeal, the Supreme Court of Canada ruled that this systemic remedy was both legal and appropriate in the circumstances.

In *Robichaud v. Canada (Treasury Board)*,⁴⁷ the Supreme Court of Canada found that an employer cannot avoid liability for sexual harassment in the workplace just because the harassment was not authorized. The purpose of human rights legislation is to remove discrimination, and this purpose would be thwarted, the Court ruled, if employers were not liable for the conduct of their employees. The Court noted that only employers can provide appropriate remedies in employment discrimination cases, because only they have the power to reinstate an employee, compensate her for lost wages, and create a discrimination-free work environment.

The history of human rights protections in Canada, then, is a history of expanding coverage and increasing recognition that discrimination is group-based and systemic and requires remedies that reach to and reverse conditions of inequality. Section 15 of the Charter is part of this trend to enact and expand human rights protections that will reduce inequality.

The Importance of Amendments to the Text

As well as being rooted in human rights initiatives, section 15 is rooted in part in a less propitious source, the *Canadian Bill of Rights*. However, as discussed earlier in Chapter One, section 15 is not a mere restatement of section 1(b) of the *Canadian Bill of Rights*, and the differences between the language of the Bill and the language of section 15 are important to interpretation. Section 1(b) of the Bill states:

- (1) It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely . . .
- (b) the right of the individual to equality before the law and the protection of the law; . . .

Certainly the language of section 1(b) of the Bill and section 15 of the Charter is similar, and because of that one might expect the case law arising from the Bill to apply to section 15. However, section 15 is critically different from section 1(b), and the language chosen for section 15 was clearly intended to represent a departure from *Canadian Bill of Rights* law⁴⁸ and to give section 15 substantive content.^{49,50}

For women and other disadvantaged groups, the significance of the shift away from "equality before the law" as the prevailing conception of equality cannot be overemphasized. As Beverley Baines has noted, there is a wide range of judicial opinion as to the meaning of "equality before the law", which in itself is a problem.⁵¹ However, despite differences in interpretations, "equality before the law" has been interpreted to be a codification of the rule of law.⁵²

Although a thorough discussion of the rule of law is beyond the scope of this study, brief reference to the rule of law and its strengths and weaknesses is warranted.⁵³ It receives express mention in the preamble to the Charter, and judges continue to regard it as an important idea. For example, in *Reference Re French Language Rights*,⁵⁴ Saskatchewan Court of Appeal Justice Cameron said:

. . . Canada is founded upon principles that recognize inter alia, "the rule of law". Among other things, that concept embraces the notion

of equality **before** the law: that all persons, whatever their rank, birth, wealth, education or other condition, are equally subject to the ordinary law of the land as administered by the ordinary courts: . . . The rule of law, in this sense, is another manifestation of the value, fundamental to our society, of the inherent worth and dignity of every member of the community; we hold to the notions that human worth is equal and that the law must respect that equality.⁵⁵

According to historian A.V. Dicey, the rule of law includes the absolute supremacy of regular law as opposed to the influence of power, and the equal subjugation of all classes to the regular law, regardless of rank.⁵⁶

The strength of the rule of law lies in its recognition that it is wrong for the state to abuse its authority, particularly its authority to penalize citizens. Even critics of the rule of law concede that it "is a vital protective and facilitative constitutional device for a fundamental scheme of individual rights".⁵⁷ And, on occasion, members of minority groups in Canada have benefited from the rule of law. For example, in 1959, in the case of *Roncarelli v. Duplessis*,⁵⁸ Canada's Supreme Court relied on the rule of law to protect the religious freedom of Jehovah's Witnesses.

The facts of *Roncarelli* are straightforward. Maurice Duplessis, then Premier and Attorney General of Quebec, had Frank Roncarelli's liquor licence cancelled. The licence was cancelled because Roncarelli, a Witness himself, had posted bail for hundreds of Jehovah's Witnesses charged with minor offences. When challenged, Duplessis argued that the Quebec Liquor Commission had discretion to cancel liquor licences and that he had merely urged them to exercise their legal authority.

The Supreme Court repudiated this argument. Justice Rand wrote:

. . . no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, . . . action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of the disintegration of the rule of law . . .⁵⁹

The problem with the rule of law from the vantage point of women is its focus on individual rights and on the form of acts rather than on their effects. *Roncarelli* was not characterized as a case about the oppression of a religious minority as a group, but rather as a case about the individual civil rights of a citizen. Individual rights are important to women's equality with men, and women as well as men require protection from abuse by public officials. However, for women to derive the full benefit of individual rights, women's oppression as a group must be recognized. Further, women's formal legal equality with men is merely a precondition to equality and not a complete formula for women's actual equality. Therefore, it is highly significant that the legislative history and language of section 15 reflect an intention to go beyond "equality before the law" as a basis for understanding equality rights.

Section 28 and Other Rights

For women, one key provision of the Charter highlights the purpose of section 15. That is section 28. Section 28 reinforces the guarantee of sex equality for women. Section 28 was intended to and should influence the interpretation of section 15, by reminding judges of women's long and unfinished struggle for equality. It should call to mind women's recent fights to obtain the franchise, to be recognized as "persons", to be admitted to professions, and to emerge from the legal invisibility that marriage has imposed on women for centuries.⁶⁰ In this way, section 28 should provide a social and historical context in which women's claims can be better understood. If the purpose of section 28 is understood and the historical disadvantage of women is acknowledged, the courts' sensitivity to sex equality challenges will be enhanced.

Unfortunately, on the face of it, section 28 does not articulate the right of women to equality. It guarantees the rights and freedoms in the Charter "equally to male and female persons". Readers not familiar with the history of section 28 may assume that it is about men's equality as much as it is about women's equality, and that it requires treating men's equality claims as though they were on the same footing as women's equality claims.

The legislative history of section 28 is an essential indicator of its purpose. Section 28 was a late amendment to the Charter; women insisted on the inclusion of section 28 because of a learned distrust of judges' treatment of women's equality cases. Given the courts' propensity to ignore, dismiss or misunderstand their claims, women wanted more certainty in the language of the Charter. Women's demands were the direct inspiration for the addition of section 28 and reflect an intention on the part of the Charter's framers to strengthen the guarantee of equality to women.

In light of this, reading section 28 as though it had the same meaning for men and women would be perverse, since it would ignore the history of the section, as well as the history of women.

It would also be perverse to read section 28 so as to reduce sex equality to a matter of formal equality between individuals. The history of section 28 shows that it is about group rights. It states the right of women as a group to have equality with men. Because individualizing women's equality problems distorts their nature, it is important that section 28 reinforces section 15's purpose of addressing inequalities experienced by groups.

Additional support for the observation that the Charter supports group rights can be found in sections 2 and 29, which accord rights to religious minorities; sections 14, 16, and 23, which entrench language rights; sections 14 and 27, which recognize Canada's multicultural make-up; and sections 25 and 35 of the *Constitution Act, 1982*, which recognize the constitutional rights of Aboriginal peoples.

Conclusion

For women, it is critical that the courts recognize and give full force and effect to the section 15 guarantee of substantive equality. If section 15 is interpreted as embodying only a formal theory of equality, women will not be well served by the constitutionalization of equality rights.⁶¹ In fact, if section 15 is reduced to a guarantee of formal equality, women would probably be best served if judges systematically rejected **all** sex equality claims. At least this would minimize the harm they could do; for it is the formal equality theory that enables men to argue that pregnancy benefits and other special programs for women should be struck down. According to formal equality theory, men and women are entitled to be treated the same, and special treatment for women infringes upon the rights of men. At this point in the history of women's struggle to overcome inequality, if formal equality becomes the prevailing definition of equality applied under section 15, women stand to lose more than they can gain from the Charter.⁶² Treating those who are unequal in terms of their access to power and resources as though they are the same contributes to substantive inequality — that is, inequality in women's actual condition — while creating an illusion of fairness.⁶³

The problem that formal equality theory presents for women is a major and recurring theme of this study because it is a major and recurring theme in Charter equality litigation and in the history of women's rights. The human rights backdrop for section 15 and the history of amendments to the Constitution demonstrate that interpretations of section 15 should not be based on formal equality theory. Section 15 should not be interpreted in ways that will exacerbate the unequal conditions of women's lives, but rather in ways that will "eliminate the social, economic, or legal causes of actual inequality".⁶⁴ If judges were to understand and accept this basic premise they could do a lot to help break down the barriers that keep women marginalized and to encourage egalitarian measures by governments.

There are many indications that a primary purpose of section 15 is to promote improvements in substantive conditions for women and other systemically disadvantaged groups. This is reflected in the larger objects of the Charter, which include the fulfilment of Canada's international human rights obligations, the legislative history of section 15, and the wording of section 15 itself which in section 15(2) refers specifically to the conditions of disadvantage of certain groups.

In particular, the legislative history of section 15 reflects an intention to depart from the narrow, formal equality interpretations rendered under the *Canadian Bill of Rights* and to increase equality protections for disadvantaged groups. The protection for women as a group is underscored and reinforced by section 28 of the Charter, and Charter provisions in addition to section 28 reflect group values. Section 15 may be seen as part of a trend in Western culture towards a greater commitment to egalitarianism, a growing commitment that is exemplified by the evolution of domestic human rights protections and jurisprudence in Canada.

Endnotes

1. *Law Society of Upper Canada v. Skapinker* (1984), [1984] 1 S.C.R. 357 at 366; *Hunter v. Southam Inc.* (1984), [1984] 2 S.C.R. 145 at 156-157; *Singh v. Minister of Employment and Immigration* (1985), [1985] 1 S.C.R. 177 at 209, 218-219; *R. v. Big M Drug Mart Ltd.* (1985), [1985] 1 S.C.R. 295 at 344 [hereinafter *Big M*].
2. *Big M*, *ibid.* at 344.
3. Adopted 16 December 1966, in force for Canada 19 August 1976, G.A. Res. 220 (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966); s. 3 requires State Parties to "ensure the equal right of men and women" to the enjoyment of certain rights, and s. 26 provides for equality before the law and equal protection and that the law shall "guarantee to all persons equal and effective protection against discrimination" based on enumerated grounds, including sex.
4. Adopted 16 December 1966, in force for Canada 19 August 1976, G.A. Res. 220(XXI), 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966).
5. Canada, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada* (Ottawa: Queen's Printer, 1980-81); D. Gibson, *The Law of the Charter: General Principles* (Toronto: Carswell, 1986); D. Lepofsky, "Equality Rights For Handicapped Persons" in F.E. McArdle, ed., *The Cambridge Lectures 1985* (Montreal: Les Éditions Yvon Blais, 1986) 117 at 131; D. Lepofsky and J. Bickenbach, "Equality Rights and the Physically Handicapped" in A.F. Bayefsky and M. Eberts, *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) at 341; M. Cohen and A.F. Bayefsky, "The Canadian Charter of Rights and Freedoms and Public International Law" (1983) 61 *Can. Bar Rev.* 265 at 302-303; A.F. Bayefsky, "The Principle of Equality or Non-Discrimination in International Law: Implications for Equality Rights in the Charter" in L. Smith et al., eds., *Righting the Balance: Canada's New Equality Rights* (Saskatoon: Canadian Human Rights Reporter, 1986); J. Claydon, "International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms" (1982) 4 *Sup. Ct. L. Rev.* 287; J. Claydon, "The Use of International Human Rights Law To Interpret Canada's Charter of Rights and Freedoms" (1987) 2 *Connecticut Journal of International Law* 349; L. Smith and W. Black, "Section 15 Equality Rights Under the Charter: Meaning, Institutional Constraints and a Possible Test" (unpublished paper, 24 October 1987).
6. J. Claydon, "International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms", *ibid.* at 287.
7. See Smith and Black, *supra*, note 5 at 1.
8. Canada, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada*, *supra*, note 5 (see 3:28). Changes resulting in stronger Charter protections inspired by international human rights law include amendments to s. 1, the addition of s. 28 (see 5:9, 22:54), and the granting of jurisdiction to the courts in s. 24 to order an "appropriate and just" remedy (see 7:99-100).
9. *Re Service Employees' International Union, Local 204 and Broadway Manor Nursing Home* (1983), 44 O.R. (2d) 392 at 439 (H.C.), rev'd in part (1984), 48 O.R. (2d) 225, in

which O'Leary, J. quoted Jean Chrétien; see also *BCGEU v. British Columbia (Attorney General)* (1988), [1988] 2 S.C.R. 214 at 236 in which Dickson, C.J.C. on behalf of the Court referred to a decision of the European Court of Human Rights regarding a right of access to the courts pursuant to the Charter; see also J. Claydon, "The Use of International Human Rights Law to Interpret Canada's Charter of Rights and Freedoms", *supra*, note 5 and J.H. Lyon and J.E. Claydon, "A Practical View of the Charter for Solicitors and Barristers", Canadian Bar Association — Ontario, Continuing Legal Education, 10 June 1986.

10. *Reference Re Public Service Employees Relations Act (Alta.)* (1987), [1987] 1 S.C.R. 313 at 349.
11. Adopted 10 December 1948, G.A. Res. 2174 (III), U.N. Doc. A/810 at 71(1948).
12. Adopted 18 December 1979, in force for Canada 10 January 1982, U.N. Soc. A/RES/34/180 (1979).
13. *European Convention for the Protection of Human Rights and Fundamental Freedoms*, signed 4 November 1950, entered into force 3 September 1953, 213 U.N.T.S. 222.
14. J. Claydon, "The Use of International Human Rights Law To Interpret Canada's Charter of Rights and Freedoms", *supra*, note 5 at 353-359. An extensive body of literature concerning the usefulness of international instruments and related jurisprudence has accumulated. For example, M. Cohen and A.F. Bayefsky, "The Canadian Charter of Rights and Freedoms and Public International Law", *supra*, note 5; W.S. Tarnopolsky, "A Comparison Between the Canadian Charter of Rights and Freedoms and the International Covenant on Civil and Political Rights" (1982) 8 *Queen's L.J.* 211; G. Tremblay, "La Charte canadienne des droits et libertés: quelques leçons tirées de la Convention européenne des droits de l'homme" (1982) 23 *C. de D.* 795; F.G. Jacobs, "Non-Canadian Constitutional Experience Relevant to the Fundamental Freedoms Provisions of the Charter: The European Convention on Human Rights" (1983) 13 *Man. L.J.* 599; E.P. Mendes, "Interpreting the Canadian Charter of Rights and Freedoms: Applying International and European Jurisprudence on the Law and Practice of Fundamental Rights" (1982) 20 *Alta. L. Rev.* 383; B. Graefrath, "How Different Countries Implement International Standards on Human Rights" (1984-85) *Can. Hum. Rts. Y.B.* 3; C. Tomuschat, "National Implementation of International Standards on Human Rights" (1984-85) *Can. Hum. Rts. Y.B.* 31; G. Levasseur, "L'influence de la Convention européenne des droits de l'homme sur le droit répressif français" (1984-85) *Can. Hum. Rts. Y.B.* 63.
15. Resolution 32/130, supported by Canada; see also the decision of MacGuigan, J. of the Federal Court of Appeal in *IFAW v. Canada* (1988), 83 N.R. 303. In this decision, which is discussed in H. Echenberg and B. Porter, "Poverty Stops Equality, Equality Stops Poverty: The Case For Social and Economic Rights" in D. Williams and P. File, eds., *Human Rights in Canada — Into the 1990s and Beyond* (Ottawa: University of Ottawa Press, forthcoming), MacGuigan, J. cites international rights provisions and decides that civil rights entrenched in the Charter cannot be considered apart from social and economic rights as set out in the *International Covenant on Economic, Social and Cultural Rights*.
16. See *Regents of the University of California v. Bakke* (1978), 98 S. Ct. 2733, and *United Steelworkers of America v. Weber* (1979), 99 S. Ct. 2721.

17. See, for example, J.K. Bankier, "Equality, Affirmative Action, and the Charter: Reconciling 'Inconsistent' Sections in Canada" in *Research Studies of the Commission on Equality in Employment* (Ottawa: Supply and Services Canada, 1985) at 307 (Commissioner: R.S. Abella).
18. *Apsit v. Manitoba Human Rights Commission* (1987), [1988] 1 W.W.R. 629 (Man. Q.B.).
19. W.S. Tarnopolsky suggests that s. 15(2) should not be read as an exception to s. 15(1), but rather as an interpretive guide to s. 15 (1) in "The Equality Rights in the Canadian Charter of Rights and Freedoms" (1983) 61 *Can. Bar Rev.* 242 at 259.
20. *Labour Standards Act*, R.S.S. 1978, c. L-1, s. 15(4)(k).
21. An example of this reasoning can be found in the case of *Opportunity Handicap Ltd.* (1983), 4 C.H.R.R. D/1231. In this case, Opportunity Handicap Ltd. applied to the Saskatchewan Human Rights Commission for an exemption from *The Saskatchewan Human Rights Code* to allow it to recruit and employ only persons with disabilities to sell light bulbs by means of telephone solicitation. Disabled employees were required by Opportunity Handicap Ltd. to use a telephone solicitation script in which they identified themselves as disabled persons before offering the light bulbs for sale. The company's position was that it performed a social good by employing disabled persons. The Commission refused to grant the exemption on the grounds that Opportunity Handicap Ltd.'s practices amounted to undignified exploitation of persons with disabilities.
22. (1969), [1970] S.C.R. 282.
23. R.S.C. 1952, c. 149.
24. (1972), 9 C.C.C. (2d) 256 (N.W.T.S.C.).
25. R.S.C. 1970, c. C-34.
26. (1974), [1975] 1 S.C.R. 693.
27. R.S.C. 1970, c. J-3.
28. (1977), 36 C.C.C. (2d) 349 (Alta. C.A.).
29. (1986), 31 C.C.C. (3d) 81 (Alta. C.A.).
30. (1987), [1987] 1 S.C.R. 424.
31. (1980), [1980] 2 S.C.R. 370 at 406.
32. *R. v. Therens* (1985), [1985] 1 S.C.R. 613 at 638: "The significance of the new constitutional mandate for judicial review provided by the Charter was emphasized by this Court in its recent decisions in *Law Society of Upper Canada v. Skapinker* (1984), 9 D.L.R. (4th) 161 at 168, and in *Hunter v. Southam Inc.* (1984), 11 D.L.R. (4th) 641 (S.C.C.)."
33. (1988), [1988] 2 S.C.R. 3 at 14-15.

34. On these points see the following two cases involving Charter provisions, though not s. 15: *Smith v. R.* (1987), [1987] 1 S.C.R. 1045 at 1069-1071 per Lamer, J.; *Big M*, *supra*, note 1 at 331-332.
35. For one discussion about the balance of power between the legislatures and the courts, see: D. Greschner and K. Norman, "The Courts and Section 33" (1987) 12 *Queen's L.J.* 155.
36. L. Smith, "A New Paradigm for Equality Rights" in *Righting the Balance*, *supra*, note 5 at 357; C. Sheppard, "Equality, Ideology and Oppression: Women and the Canadian Charter of Rights and Freedoms" in C.L.M. Boyle et al., eds., *Charterwatch: Reflections on Equality* (Toronto: Carswell, 1986) at 198-200; M. Eberts, "The Rights of Women" in R. St. J. MacDonald and J.P. Humphrey, eds., *The Practice of Freedom: Canadian Essays on Human Rights and Fundamental Freedoms* (Toronto: Butterworths, 1979) at 225-236; W.S. Tarnopolsky and W. Pentney, *Discrimination and the Law: Including Equality Rights Under the Charter* (Don Mills, Ont.: DeBoo, 1985) at Part I, Background and Setting.
37. *Canadian Human Rights Act*, S.C. 1976-77, c. 33; *Fair Practices Act*, R.S.N.W.T. 1974, c-F2; *Human Rights Act*, S.Y. 1987, c. 3; *Human Rights Act*, S.B.C. 1984, c. 22; *The Individual's Rights Protection Act*, R.S.A. 1980, c. I-2; *The Saskatchewan Human Rights Code*, R.S.S. 1978, c. S-24.1; *The Human Rights Code*, S.M. 1987, c. 45; *Human Rights Code*, 1981, S.O. 1981, c. 53; *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12; *New Brunswick Human Rights Code*, R.S.N.B. 1973, c. H-11; *Human Rights Act*, S.N.S. 1969, c. 11; *Prince Edward Island Human Rights Act*, S.P.E.I. 1975, c. 72; *Newfoundland Human Rights Code*, R.S.N. 1970, c. 262.
38. S.O. 1981, c. 53.
39. These statutes are: *An Act Respecting Unemployment Relief*, S.B.C. 1931, c. 65, schedule A, s. 8; *An Act to Amend the Libel Act*, S.M. 1934, c. 23, s. 1; *An Act to Protect Certain Civil Rights*, S.S. 1947, c. 35; *An Act to Provide Social Assistance*, R.S.B.C. 1948, c. 310, s. 8; *The Insurance Act*, S.O. 1932, c. 24, s. 4.
40. Indians did not receive the federal franchise until 1960: *Dominion Elections Act*, S.C. 1960, c. 7.
41. Regarding fair employment practices see, for example, S.O. 1951, c. 24; S.M. 1953 (2nd Sess.), c. 18; S.N.S. 1955, c. 5; S.N.B. 1956, c. 9; S.B.C. 1956, c. 16; S.S. 1956, c. 69. Regarding fair accommodation practices see, for example, S.O. 1954, c. 28, s. 2; S.S. 1956, c. 68; S.N.B. 1959, c. 6; S.N.S. 1959, c. 4; S.M. 1960, c. 14.
42. A new *Yukon Territory Human Rights Act* S.Y. 1987, c. 3 came into effect on 1 July 1987. It replaced the *Yukon Territory Fair Practices Ordinance* Y.T.O. 1963 (2nd Sess.), c. 3. The new Act provides expanded rights, creates a Human Rights Commission to enforce them, and establishes a Board of Inquiry system for adjudication of complaints.

The Northwest Territories is now the only jurisdiction without modern human rights legislation. It has a *Fair Practices Act* R.S.N.W.T. 1974, c.-F2, which was first introduced in 1974. While the Act has been amended to update it a number of times since 1974, it still does not provide for an independent commission or a board of inquiry system.

Although a new human rights act is being drafted for the Northwest Territories, its introduction appears to have been delayed.

43. All jurisdictions have extended prohibitions against discrimination to cover sex, age, marital status, and disability in at least certain spheres of activity. Two exceptions are notable. First, marital status is not covered with respect to the provision of, *inter alia*, services, facilities, and accommodation in Nova Scotia or Alberta. Second, mental disability is not covered in Saskatchewan or Alberta.

Criminal record is covered in British Columbia, Ontario, Quebec, and the Yukon. Political belief is covered in British Columbia, Manitoba, Quebec, Prince Edward Island, Newfoundland, and the Yukon. Family status is covered under federal law, and in Manitoba, Ontario, Quebec (civil status), Northwest Territories, and the Yukon. Sexual orientation is covered in Manitoba, Ontario, Quebec, and the Yukon.

44. (1985), [1985] 2 S.C.R. 536.
45. *Canadian Odeon Theatres Ltd. v. Saskatchewan Human Rights Commission* (1985), 6 C.H.R.R. D/2682 (Sask. C.A.). Leave to appeal to S.C.C. denied. The Saskatchewan Court of Appeal ruled that, in this case, treating a disabled person the same as a non-disabled person did not provide equality. The Court said that a person with disabilities is entitled to treatment that will provide an equal result.
46. (1987), [1987] 1 S.C.R. 1114.
47. (1987), [1987] 2 S.C.R. 84.
48. L. Smith, "A New Paradigm for Equality Rights" in *Righting the Balance*, *supra*, note 5 at 357; P.W. Hogg, "A Comparison of the Canadian Charter of Rights and Freedoms with the Canadian Bill of Rights" in W.S. Tarnopolsky and G.-A. Beaudoin, eds., *Canadian Charter of Rights and Freedoms: Commentary* (Toronto: Carswell, 1982) at 19-20, and in the same text, W.S. Tarnopolsky, "The Equality Rights" at 396-397 and 421-422; N. Finkelstein, ed., *Laskin's Canadian Constitutional Law*, 5th ed., vol. 2 (Toronto: Carswell, 1986) at 1267-1273; Canada, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada* (Ottawa: Queen's Printer, 1980), 14 November 1980 at 5A:2, 4 December 1980 at 19:30, 9 December 1980 at 22:110-111, 9 December 1980 at 22:55-60; Motion tabled by the Minister of Justice in the House of Commons, 13 February 1981 at 5; R. Elliot, "Interpreting the Charter — Use of the Earlier Versions as an Aid" [1982] *U.B.C. L. Rev. Charter Edition* at 11-57; M. Eberts, "Women and Constitutional Renewal" in A. Doerr and M. Carrier, eds., *Women and the Constitution in Canada* (Ottawa: Canadian Advisory Council on the Status of Women, 1981) at 3-27; L. Pal and F.L. Morton, "Bliss v. Attorney General of Canada: From Legal Defeat to Political Victory" (1986) 24 *Osgoode Hall L.J.* 141.
49. Drafts of s. 15 were amended in response to representations by women's organizations and others concerning the inadequacy of s. 1(b) jurisprudence. S. 15 underwent a transformation from a clause guaranteeing "equality before the law" and "equal protection of the law" to a guarantee of these together with "equality under the law" and "equal benefit of the law". The additions were intended to give s. 15 substantive content and to ensure that the guarantee applied to benefits, not just penalties. Furthermore, the list of enumerated grounds was made open-ended to indicate that the list of grounds

is not exhaustive, and the grounds of physical and mental disability were added. The amendment to include named protections for persons with disabilities affirmed that s. 15 should benefit disadvantaged groups.

50. R. Elliot, "Interpreting the Charter", *supra*, note 48.
51. B. Baines, "Women, Human Rights and the Constitution" in A. Doerr and M. Carrier, *supra*, note 48 at 48-50.
52. *A.G. Canada v. Lavell* (1974), [1974] S.C.R. 1349 at 1366.
53. For more information and criticism concerning the rule of law, see: A.C. Hutchinson and P. Monahan, "Democracy and the Rule of Law" in A.C. Hutchinson and P. Monahan, eds., *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987) at 97; M. Horowitz, "The Rule of Law: An Unqualified Human Good?" (1976) 86 *Yale L.J.* at 561.
54. *Reference Re French Language Rights of Accused in Saskatchewan Criminal Proceedings* (1987), [1987] 5 W.W.R. 577 (Sask. C.A.).
55. *Ibid.* at 600-601.
56. A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan, 1961).
57. A.C. Hutchinson and P. Monahan, "Democracy and the Rule of Law", *supra*, note 53 at 106.
58. (1959), [1959] S.C.R. 121.
59. *Ibid.* at 140-142.
60. See Mary Eberts' description of the women's equality issues that are the background for the Charter in *Equality Rights and the Canadian Charter of Rights and Freedoms*, *supra*, note 5.
61. Some commentators argue that if the judiciary takes an activist approach to interpreting the Charter, that is, if the judiciary intervenes to strike down laws and programs and applies liberal values, this will have a detrimental effect on Canadian society, including disadvantaged groups. (The effect of liberalism on decision-making is discussed in: A.C. Hutchinson and A. Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter" (1988), 38 *U.T.L.J.* 278.) It is argued that liberal preconceptions concerning the role of the state will result in decisions that cut back on legislative protections for disadvantaged groups. This warning should not be taken lightly.

According to classical liberal theory, society is composed of isolated, competitive individuals; the state, which is embodied by government, has a duty to treat like individuals alike, but has no positive obligation to reduce inequality among groups. It is the duty of the courts to restrain government from interfering in social relations. The state is perceived as a threat to individual autonomy. The purpose of the Charter in such an arrangement between individual and state is to "entrench certain basic rights and freedoms and immunize them from legislative encroachments." (See *R. v. Whyte* (1988), [1988] 2 S.C.R. 3 at 14.) This ideological view of Canadian society is inadequate because

it disregards the need of disadvantaged groups, such as women, for positive government intervention throughout society, to reduce the extreme disparities in social condition produced by patriarchy and capitalism.

A combination of judicial activism and liberal ideology can lead to the striking down of benevolent legislative measures and the immunization of non-governmental oppression from legislative attention. Indeed in the first six years of Charter decision-making, the courts have dealt devastating blows to the labour movement (see *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.* (1986), [1986] 2 S.C.R. 573; *Levine, A.G. Manitoba v. Metropolitan Stores Ltd.* (1987), [1987] 1 S.C.R. 110). As we show in Chapters Three and Four, there are also serious problems in the early sex equality litigation.

Whether women will be well-served in the long run by the constitutionalization of sex equality rights is truly a question of what values the judges apply to the equality rights guarantee. Liberal ideology gives rise to a theory of formal equality, which posits that equality means equality in the form of the law and requires treating everyone the same, rather than changing the conditions of those who are disadvantaged. If formal equality is the only meaning given to the equality guarantee, constitutionalization will not help women.

62. See, for example, K.A. Lahey, "Feminist Theories of (In)Equality" in S.L. Martin and K.E. Mahoney, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) at 71-85.
63. C. Sheppard, "Equality, Ideology and Oppression" in *Charterwatch*, *supra*, note 36.
64. K.A. Lahey, *supra*, note 62 at 82.



SEX EQUALITY LITIGATION

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Introduction

Three years of constitutional equality litigation in Canada have produced a body of 591 decisions.¹ Of these 591 decisions, 52 are concerned with sex as a ground of discrimination.² The number drops to 44 when appeals and other additional proceedings related to any one case are discounted. This means that, in less than 10 per cent of the equality rights decisions, a challenge has been made on the basis that a rule or practice infringes the sex equality guarantee of section 15 of the Charter. This percentage of sex equality challenges is small, considering the interest women have shown in Charter litigation, the range of inequalities they experience, and the fact that women make up a majority of Canada's population.³

The fact that the number of challenges is small would be less important if the challenges were ones that significantly promoted the equality of women. However, this is not the case. Ironically, women's sex equality challenges are significantly underrepresented among the sex equality decisions. Only nine of the sex equality challenges were made by or on behalf of women.⁴ The other 35 challenges were made by or on behalf of men.⁵ If men's "fetal rights" challenges to women's reproductive autonomy and men's challenges to sexual assault legislation (based on age equality, freedom of expression, liberty, and fair trial rights) were added to the tally, the picture would look even worse.⁶ (The 44 sex equality decisions are listed and categorized in Appendix C.)

To analyse the sex equality challenges we begin by describing the women's challenges and then we examine the cases in which the sex equality guarantee has been invoked to further the interests of men. The purpose of this overview is to show what types of claims are being brought by women and men and their outcomes. We also hope to familiarize readers with the facts of cases that now form part of Canada's Charter sex equality jurisprudence and to introduce certain interpretive issues.

The chapter concludes with an examination of selected cases that illustrate trends in the equality rights arguments being advanced by litigants.

The Women's Challenges

Women's sex equality challenges have been divided evenly between the areas of family law, employment law, and personal injury law, with a smattering of challenges in the areas of human rights law, prison law, and laws concerning women's reproductive autonomy. To date, most of women's sex equality challenges have been directed at longstanding rules and practices that are overtly discriminatory.

The women's challenges have generally been made in the context of civil litigation initiated by them, such as maintenance proceedings or a human rights complaint. However, the initiator of a legal case and the party that raises the Charter challenge are not necessarily one and the same person. Therefore, some clarification of terminology is required. When we refer to "women's cases", we mean cases in which sex equality challenges have been raised to further women's interests, regardless of who commenced the litigation. Accordingly, *Wallace*⁷ and *Morgentaler*,⁸ both criminal cases, are included in the women's challenges. Correspondingly, when we refer

to "men's cases" we mean cases in which sex equality challenges have been raised to further men's interests, regardless of who commenced the litigation. So, for example, a host of other criminal cases, mainly concerning sexual assault, are included in the men's challenges because, even though the cases were initiated by Attorneys General, these are cases in which the Charter has been invoked by men to further their interests in maintaining power over women.

The results of the women's cases have been mixed. The success rate of the women's initiatives stands at about 50 per cent, lower if one takes into account cases of marital status discrimination, lesbian rights cases, and lower court decisions that were reversed on appeal.⁹ However, because the number of women's cases is so small, this percentage may not be a reliable indication of the success rate of women's challenges over the longer term.

Women and Family Law

■ The Myth That Sexually Independent Women Lie

The case of *Gorzen v. Litz*,¹⁰ involved a successful section 15 challenge to the Saskatchewan *Children of Unmarried Parents Act*,¹¹ which required a single mother's evidence of paternity to be corroborated. The Court of Appeal struck down this archaic provision, noting that it came from a period when

[i]t was thought that the oath of a woman so morally deficient as to have engaged in the sexual act outside of marriage and to have born a bastard child (as the law then characterized children born out of wedlock) was of less worth than the oath of another person of more apparent upright standing and habit.¹²

The Court concluded that this law advanced a stereotypical view of single women in these circumstances, adversely and significantly affected their fair trial interests, and did not treat similarly those similarly situated.¹³

■ Access to the Courts

*Williams v. Haugen*¹⁴ also involved a successful section 15 challenge to the *Children of Unmarried Parents Act*.¹⁵ Section 9 of the Act imposed a limitation period of one year from the date of birth on single mothers seeking child maintenance. The Court ruled that the section discriminated against single mothers on the basis of gender, because fathers and married mothers were not subject to any deadline for commencing maintenance proceedings.¹⁶

■ Lesbian Relationships

Thus far, no progress has been made under the Charter for lesbian women. In the case of *Anderson v. Luoma*,¹⁷ a lesbian mother separating from her lesbian partner sought maintenance for the children, pursuant to the British Columbia *Family Relations Act*,¹⁸ and as an alternative position she challenged the legislation, relying on section 15 of the Charter. The couple had lived together for ten years and had two children, who were conceived by means of alternative insemination. Justice Dohm of the British Columbia Supreme Court rejected the maintenance claim on the basis of his interpretation of the legislation, saying:

The phrase 'living together as man and wife' . . . can only mean what it says, namely, a man and woman living together and not married.

Two persons of the same gender living together misses the mark by 50 percent. The defendant in my view can never be a 'parent' and it is highly unlikely that she could ever become a 'stepparent' to the children.¹⁹

The equality rights challenge was rejected in one extremely brief sentence: "The answer is found in s. 1 of the Charter."²⁰ Section 1 is the Charter's general limitation section. It says:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The effect of section 1 is to allow Charter rights to be limited where the limit is reasonable, prescribed by law, and demonstrably justifiable in a free and democratic society.²¹ As the outcome of *Anderson v. Luoma* illustrates, the courts' interpretation of the interaction between Charter rights and section 1 limits is of crucial importance to women. However, the Court's decision in *Anderson v. Luoma* regarding sections 15 and 1 is a decision without reasons; as such, it sheds no light on the question of what an appropriate interaction between these sections might be.

Women and Personal Injury Law

■ Legal Rights for Married Women Injured by Their Husbands

In the area of personal injury law, two women's equality issues have been litigated. One is the question of the right of women to recover compensation for injuries inflicted on them by their husbands, either intentionally or unintentionally. The other concerns the right of women to compensation for losses they may experience as a result of injuries sustained by their husbands.

The ground of direct discrimination that arises in relation to the first issue is marital status. For centuries, at common law there was a legal barrier against lawsuits for tortious acts (such as assaults) between spouses. This bar was codified in *Married Women's Property Acts*.²² It stemmed from the legal fiction that husband and wife are one entity under the law, and the belief that such laws were required to safeguard marriage. Although gender-neutral on its face, the bar has operated to the greater detriment of women. This is so because women are the more common victims of spousal violence. Also, when travelling by car with their husbands, women are more likely to be sitting in a passenger seat; therefore, in the event of an accident, women are more likely to have personal injury claims against their husbands than the other way around.²³

In *Grabbe*,²⁴ a woman's insurance claim for compensation for injuries arising from a 1984 car accident in which her husband was at fault had been rejected by the Insurance Corporation of British Columbia (ICBC). When the case went to appeal on November 12, 1986, ICBC and the government of British Columbia relied upon the *Married Women's Property Act*²⁵ to justify nonpayment, notwithstanding that the offending legislative provisions had been repealed as of April 17, 1985 because the government considered that it offended section 15 of the Charter.

The dynamic was similar in the case of *Davidson*,²⁶ which was heard in the British Columbia Court of Appeal at the same time as *Grabbe*. In *Davidson*, children were denied compensation for the loss of their mother who had died in a 1980 car accident caused by their father's negligence. Neither *Grabbe* nor *Davidson* was presented as a sex discrimination case, so we have not included them in our count of nine women's sex equality cases; however, we think them sufficiently relevant to women's equality to warrant discussion.

The Charter challenges by the claimants in both *Grabbe* and *Davidson* were rejected by the British Columbia Court of Appeal because the accidents preceded the coming into force of section 15, and because the amending British Columbia legislation was worded so as to permit ICBC to continue discriminating right up to April 17, 1985.²⁷

The striking aspect of *Grabbe* and *Davidson* is not the Court's holding, which is consistent with many other case authorities concerning the retrospective operation of the Charter, but the stance of the government. Courts had criticized the *Married Women's Property Act* well before section 15 came into force.²⁸ Despite warnings from the courts concerning the need for reform in this area of the law, the three-year moratorium between 1982 and 1985, and the ease with which the government of British Columbia could have enacted legislation allowing recovery for all outstanding and future claims, it chose to maintain and defend a discriminatory law as long as it was technically possible to do so.

■ Legal Rights for Married Women Whose Husbands Become Injured

The other issue that women have litigated in the area of personal injury law concerns the right of spouses to sue third parties for damages for loss of consortium. Consortium has been defined as "[c]ompanionship, love, affection, comfort, mutual services, [and] sexual intercourse".²⁹ Traditionally, only men's rights to compensation for loss of consortium had been recognized. In *Power v. Moss*,³⁰ the right to claim damages for loss of consortium was extended to a woman whose husband had been injured in a car accident, on the basis that the common law rule that recognized only men's rights to such damages violated women's equality.

Women and Employment Law

■ Conflicts Between Religion and Sex Equality

In the area of employment law, there have been four women's sex equality challenges. All of these cases were unsuccessful at the first court level. In the case of *Casagrande v. Hinton Roman Catholic Separate School District*,³¹ an unmarried teacher challenged the decision of the school district to dismiss her when she became pregnant. Manuela Casagrande claimed that the school district discriminated against her because of her sex. The school district contended that, as a Catholic school system, it had the right to fire anyone who did not conform to Catholic teachings. Casagrande's challenge was rejected by the Alberta Court of Queen's Bench on the constitutional basis of a provincial statute, enacted in 1905, that authorizes the establishment of separate Catholic schools as well as section 29 of the Charter which states:

29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

The Court said that section 15 equality rights were overridden by section 29, which protects the right of Roman Catholics to dismiss separate school teachers for *bona fide* denominational cause.³²

The Court's recognition of a separate school board's right to discriminate in order to protect the character of denominational schools causes us to fear that similar historical factors will stand in the way of future attempts by women to exercise their sex equality rights under the Charter. For example, Indian women are still fighting to overcome the effects of the *Indian Act*³³ provisions that penalized Indian women for marrying non-Indian men. The sex equality claims of Indian women are being resisted by some Indian men and some bands on the basis of Aboriginal rights.³⁴ Section 25 of the Charter contains a non-abrogation clause concerning Aboriginal rights, which, if the courts follow the pattern of *Casagrande*, could be a threat to the sex equality rights of Aboriginal women.

The Court in *Casagrande* also rejected the sex discrimination arguments, on the grounds that the "no intercourse" rule applied to men and women equally and that "[t]he cause for terminating the contract was the life-style which the pregnancy evidenced".³⁵

In a case such as this where the sex discrimination is indirect, it may be difficult for courts to perceive it.³⁶ While the negative effects of a no-intercourse rule may strike women more often than men, because women can become pregnant and men cannot, the obvious defence for the employer is that pregnancy is a biological result of the forbidden activity, not an effect of the no-intercourse rule. It seems logical that the rule must be attacked on other grounds, such as marital status and freedom of religion (not that we think that such arguments would have succeeded in this case), and that sex equality arguments alone would not be persuasive. However, it should be possible to press the sex equality arguments further than perhaps they were here. One might ask, for example, whether the employer was at all vigorous about investigating the sexual activities of its men teachers, or whether in fact the no-intercourse rule really amounted to a no-pregnancy rule. The judgement in *Casagrande* does not indicate whether this sort of question was addressed in the hearing.

■ Lesbian Relationships

In the case of Karen Andrews,³⁷ the issue was health benefits coverage for Toronto library employee Karen Andrews' lesbian partner. In the *Karen Andrews* case, the Supreme Court of Ontario upheld the Ontario Health Insurance Plan practice of recognizing only spouses of the opposite sex.

In the case of *R. v. Sylvestre*,³⁸ the respondent had been discharged from the Armed Forces for the sole reason that she was an admitted lesbian. She challenged the discharge by suing pursuant to section 15 and the liberty and security rights recognized in section 7 of the Charter. The government moved to have the case dismissed, saying that it disclosed no cause of action. The Federal Court of Appeal

granted the government's motion. The Court found that section 15 did not apply because it had not been in force at the time of her release. Section 7 arguments also failed because, the Court reasoned, Sylvestre had not been denied the liberty to be homosexual; she had only been denied a job, to which she did not have a constitutional right.

In our overview of women's challenges, we decided to include the lesbian rights cases of *Karen Andrews*, *Sylvestre*, and *Anderson*³⁹ (discussed earlier). In court, these cases were not presented as sex equality cases; therefore, they are not included in our count of women's sex equality cases. However, in our view, sexual orientation is an issue of sex equality for women because it bears on the freedom of women to be economically and sexually autonomous from men. Further, in *Karen Andrews* and *Anderson*, a sex discrimination argument can be made based on the simple fact that, if either the applicants or their partners were male instead of female, they would be entitled to the benefit of the law in question. The *Karen Andrews* decision is under appeal in the Ontario Court of Appeal.

■ Overcoming Historical Patterns of Employment Discrimination

The case of *Wilson v. Medical Services Commissioner of British Columbia*⁴⁰ is the third of the employment law challenges. In this case, a challenge was made to British Columbia's health insurance billing scheme, which limited the ability of doctors to practise medicine in the province. Under the scheme, doctors were required to apply for billing numbers, which could be refused or restricted to certain geographic regions or to temporary work. However, a "grandfather" clause applied to doctors who had participated in the billing plan during the previous two years. These doctors were automatically granted unrestricted billing numbers.

A previous billing system had been ruled unconstitutional on a variety of grounds.⁴¹ One of the arguments in support of the doctors' challenge to the new scheme was that, by favouring established doctors, it had an adverse impact on women who are just beginning to enter the medical profession in significant numbers. The challenge failed at the British Columbia Supreme Court, and the sex discrimination arguments were dismissed summarily. This decision was overturned on appeal, without mention of women's rights. The government of British Columbia's application for leave to appeal to the Supreme Court of Canada was denied.

Although the outcome of *Wilson* may be seen as positive from the perspective of new women doctors in British Columbia, the cursory attention paid to the adverse impact arguments in the courts' decisions is disappointing. So far there is very little equality jurisprudence that supports women's claims concerning adverse impact discrimination — that is, sex discrimination that is not apparent on the surface of a rule or practice. Judicial understanding of adverse impact discrimination will be critical to the success of many cases of double and multiple disadvantage that have not yet reached the courts.

Women and Human Rights Law

■ Access to Sports Opportunities

Re Blainey and Ontario Hockey Association,⁴² is a Charter equality case that raised important questions about the scope of human rights protections for women.

It will also have important implications for others whose interests are inadequately covered by human rights legislation. Justine Blainey, who was 12 years old when legal proceedings began, played boys' Minor PeeWee Division hockey. Comparable opportunities were not available to her in the local girls' hockey league. However, Blainey was ruled ineligible for membership in the parent Ontario Hockey Association because she was not a "male person". This effectively barred her team from entering her in official competition. The Ontario Human Rights Commission refused to accept her complaint of sex discrimination because section 19(2) of the Ontario *Human Rights Code, 1981*⁴³ provided that "[t]he right . . . to equal treatment with respect to services and facilities is not infringed where membership in an athletic organization or participation in an athletic activity is restricted to persons of the same sex." Blainey then sued on the basis that section 19(2) denied her the equal protection and equal benefit of the Ontario *Human Rights Code*, contrary to section 15 of the Charter.

The Ontario Court of Appeal ruling is notable because the Court agreed that section 19(2) permitted both direct and adverse discrimination against females, contrary to section 15 of the Charter. Although section 19(2) was gender-neutral on its face, the Court found that the effect of the section was that females, not males, were being denied the right to participate in athletic facilities. Justice Dubin said, "In substance, it permits the posting of a 'no female allowed' sign in every athletic organization in this province."⁴⁴ As a result, the Court found section 19(2) of the Ontario *Human Rights Code* unconstitutional, and struck it down.

Women in Prisons

■ Flexible Arrangements Required by Smaller Prison Population

The major women's sex equality case in the area of prison law is *Horii*.⁴⁵ Inmate Gail Horii was unsuccessful in the first stage of her challenge to sex discrimination in the federal penitentiary system. Her claim was that the system discriminates against women sentenced to a federal penitentiary by requiring all of them to serve their time at the prison for women in Kingston, unless alternative arrangements can be made with provincial institutions, whereas men can be incarcerated closer to their families because there are more federal prisons for men. The trial division of the Federal Court refused Gail Horii's pre-trial request to remain in a provincial institution in Mission, British Columbia, where she would be close to her husband who was critically ill. Notwithstanding the Court's view that the prison authorities were refusing to accommodate Horii's request merely to demonstrate that it was their prerogative to do so, Justice Reed rejected the request for a pre-trial remedy because she doubted that Horii's Charter challenge would ultimately be successful.⁴⁶

■ Flexibility in Sentencing Required

The problem of centralized corrections facilities for women exists at a provincial level as well. In *Wallace*,⁴⁷ an Ontario District Court judge invoked the broad remedial powers conferred on the courts by section 24 of the Charter and revised his sentence. He imposed a fine rather than a prison sentence on a woman convicted of impaired driving because the only correctional facility for women was in a distant location, which would not have permitted her to maintain her employment. Had Wallace been

a man she would have been able to serve an intermittent sentence in a nearby facility.

Women's Reproductive Autonomy

■ Decriminalization of Abortion

In the area of women's reproductive rights, there is one decided case, *Morgentaler*.⁴⁸ Although Charter arguments in the courts below had been unsuccessful, after many years of battling in the courts, on January 28, 1988, Henry Morgentaler secured a ruling from the Supreme Court of Canada. The ruling declared women's constitutional right to be free from a law that criminalized abortion and that established a regime for legal abortions thereby causing dangerous delays and interfering with women's life, liberty, and security of the person.⁴⁹ Section 15 sex equality arguments were also advanced and considered in *Morgentaler*; therefore, *Morgentaler* is included in our overview of sex equality cases.

Unfortunately, however, the case was not ultimately decided on equality grounds. And because the criminal law against abortion was not struck down on equality grounds, the value of the *Morgentaler* decision as a precedent to assist women in arguing for improved access to abortion may be limited. Essentially the *Morgentaler* decision places limits on the power of the state to interfere with women's security of the person, but it does not recognize women's freedom of choice and access to health services as positive rights necessary for the achievement of sex equality.

Morgentaler is unique among women's sex equality challenges in that its initiator, Dr. Henry Morgentaler, is a man. Although there can be no doubt that this case has promoted women's Charter rights and was intended to do so,⁵⁰ women might have placed greater emphasis on equality rights, rather than security rights arguments, had they had the opportunity to initiate and direct this challenge themselves. They might also have framed the equality rights arguments differently. However, the *Morgentaler* challenge is clearly not in a category with most other sex equality challenges made by men — which, as we shall see, are mainly attacks on legislative benefits or protections for women in vulnerable circumstances.

This concludes our description of women's sex equality cases for the first three years that section 15 has been in force. There are only nine decided cases, and there is little expansive or concerned discussion of women's inequality in them.

Men's Use of the Equality Guarantee

Earlier, we said that approximately half of women's sex equality challenges had met with success. The success rate for men's challenges is somewhat lower. However, because there are more men's sex equality challenges (in fact, there were more than three times as many), men's successes have been more than double those of women.⁵¹ Men have succeeded in 13 challenges in the areas of family, employment, prison, and criminal law. The greatest concentration of men's sex equality challenges is in the area of criminal law, with family law challenges in second place. The body of men's challenges is large enough that we cannot describe them all here, but the following cases are typical.

Men and Family Law

■ Fathers' Rights

In Newfoundland, before a Review Committee of the National Department of Health and Welfare, David Vincer challenged section 9(1) of the *Family Allowance Act* regulations,⁵² which provides that the family allowance, usually paid to the mother, shall be paid to the father only if he has sole custody of the child. Vincer contended that the provision violated the Charter's sex equality guarantee and that he should be entitled to receive the family allowance because, pursuant to the separation agreement with his ex-wife, he had joint custody of their children. The Review Committee ruled in his favour. On appeal, the Federal Court of Appeal remitted the case to the Review Committee, holding that the Committee was not a court of competent jurisdiction to rule on the validity of the regulations.⁵³

In Nova Scotia, a father named Charles Phillips successfully challenged the *Family Benefits Act*,⁵⁴ which provided benefits for single mothers but not for single fathers, unless they were disabled. The applicant requested that the scheme be extended to single fathers in need, and alternatively that the scheme be struck down. It is not clear why Phillips' counsel asked that the scheme be struck down, because having it struck down would not result in benefits being paid to Phillips, but would simply result in poor women being denied benefits. The decision of the Nova Scotia Supreme Court, which was upheld by the Court of Appeal, struck down the benefits for single mothers.⁵⁵

In British Columbia, a putative father named Jerry Ricard attempted to avoid child maintenance proceedings taken against him by single mother Vicki Shewchuk, arguing that assistance in obtaining child support orders was provided to single mothers under the *Child Paternity and Support Act*⁵⁶ but not to single fathers.⁵⁷ The British Columbia Court of Appeal agreed that the Act violated section 15, but found that it was a reasonable limit on equality rights permitted by section 1 of the Charter.

In Ontario, Shalom Schachter challenged the *Unemployment Insurance Act*,⁵⁸ which provides parental benefits for adoptive parents and pregnancy benefits for the biological mother, but no benefits for the biological father.⁵⁹ The Court found that the Act was deficient because it failed to provide parental benefits for biological mothers and fathers, and the Court extended parental benefits, formerly available to adoptive parents only, to both biological mothers and fathers.

Men and Employment Law

■ Attack on Women's Organizations

In the *Federation of Women Teachers* case,⁶⁰ a men teachers' federation attacked the structure of the all-women teachers' federation that had been founded in 1918 to further the employment interests of Ontario women teachers. This case is unique in the body of men's sex equality challenges in that the named applicant, Margaret Tomen, is a woman. The men brought the challenge through a woman applicant, contending that any sex-based distinction constitutes a section 15 violation. The Federation of Women Teachers, whose structure was under attack, defended the challenge by claiming that a women-only organization that promoted sex equality

could not violate section 15 because it was protected by section 15. The Court held that the Federation's bylaws were essentially private and therefore outside the scope of the Charter's application. The case is under appeal.

Men in Prisons

- Men Seek Women's Protections and Challenge Affirmative Action Programs for Women Employees

In *Weatherall*,⁶¹ inmates at Joyceville Penitentiary — a men's facility near Kingston, Ontario — challenged two sets of regulations, one that allowed women guards to conduct searches of them in some circumstances, and a second that categorically prohibited men guards from conducting searches of women prisoners. The regulations concerning the men prisoners stated that women guards could be present during strip searches, do frisk searches in urgent circumstances, and conduct cell surveillance. The regulations concerning women prisoners stated "no such person, who is female, shall be searched except by a female person."⁶²

The negative implications of the challenge of the male inmates in the *Weatherall* case were two-fold. First, the challenge to the already limited searches of male prisoners by women guards jeopardized employment opportunities for women guards. Because there are relatively few women prisoners, most employment opportunities for guards are in men's prisons. If the allowable duties of women guards in men's prisons became too restricted, the authorities in the men's prisons could be expected to resist hiring women. Second, the challenge to the protective regulations for women prisoners threatened the bodily security of women prisoners, for whom searches by the opposite sex are more intimidating.

The applicants' arguments in this case are analogous to the arguments in *Phillips*⁶³ in the sense that the remedy requested by the applicants in both cases went beyond their needs. If the men inmates wanted increased privacy protection for themselves, they could have confined their challenge to their lack of privacy rights without imperiling the special protections for women inmates. Even though the living conditions for women inmates have no effect on men inmates, the men nevertheless challenged the special protection for women inmates and did so successfully. The Court recognized women's employment interests and said that the inmates' equality and privacy rights would have to be balanced against women's employment interests, but it struck down the regulation prohibiting searches of women prisoners by male guards. In Chapter Four, we will comment further on the Court's reasoning in the *Weatherall* decision.

Men in the Criminal Justice System

- Challenges to Sexual Assault Laws

Fully half of the men's sex equality cases are in the criminal law area, and they consist primarily of challenges to sexual offence provisions of the *Criminal Code*. In these cases, men initiate equality challenges to defend themselves against criminal charges. The provisions that have been challenged include:

- section 146(1), which made sexual intercourse with a girl under age 14 an offence;

- section 149, which made indecent assault of a female person an indictable offence; and
- section 153(1), which contained protections for vulnerable young women, such as protections for foster daughters against men in positions of authority such as their foster fathers.

These challenges have resulted in legislation being struck down on four occasions.⁶⁴ Even though many of the sex equality challenges in those cases were rejected by the courts on section 1 grounds, all of the offence provisions have now been amended and made gender-neutral, a government reaction to the introduction of the Charter that may not be in the best interests of women.⁶⁵

Placing Men's Sex Equality Litigation in a Social Context

Looking at the body of men's cases as a whole, it is apparent that men are using the Charter's guarantees to strike back at certain of the law reforms that women fought for in the 1960s and 1970s. There may be some exceptions, but this is definitely the pattern.⁶⁶ Their efforts do not appear to be co-ordinated or part of any conscious political strategy — indeed, there are few signs that men are even aware of a broad social context for their sex equality challenges. However, most often, the targets of men applicants in sex equality cases are legislative protections and benefits that women have acquired in the last ten or twenty years as a result of intensive lobbying efforts. As the decided cases show, these protections and benefits include recent legislation concerning sexual assault, welfare benefits for single mothers, and unemployment insurance pregnancy benefits.

Whereas most women's challenges have been made in cases initiated by them, the pattern in the men's cases is quite different. Men's sex equality challenges have been made most often in the context of litigation in which they are on the defensive, either as accused persons in criminal cases or as respondents in civil cases. Some cases convey an impression that sex equality arguments are being made without a great deal of forethought, quite often in combination with other arguments, simply to help extricate men from uncomfortable legal predicaments.

The family law case of *Hommel v. Hommel*⁶⁷ provides a good illustration. Mr. Hommel sought to reduce a monthly maintenance order for his former wife, Ms. Hommel, and their three children, contending that she had a "duty" to accept a marriage offer she had received from another man and, further, that she was keeping his maintenance payments artificially high by staying at home to care for the children rather than going out to work. The Nova Scotia Supreme Court noted that even though Ms. Hommel was caring for the three children of the marriage, the youngest of whom was under six years, Mr. Hommel took particular exception to her caring for a fourth "illegitimate" child who was not his. Mr. Hommel's Charter argument, which the Court rejected, was that he was being discriminated against because if he fathered another child, the courts would not consider the resulting added financial burden to him. This was plainly wrong, because the Court would have been required to consider a change in his ability to pay maintenance. The application for a reduction in maintenance was denied, and the Court had this to say about the equality argument:

Counsel should not be quick to allege discrimination merely because a judicial determination does not favour counsel's client.⁶⁸

Some may imagine that litigation to secure more benefits for men also may assist women. This is the implication of a statement by Shalom Schachter quoted in a major article in *The Lawyers Weekly* following the Federal Court decision on his successful challenge to unemployment insurance pregnancy benefits:

"I see this case as sort of opening the doors of fathers' consciousness that it is possible for them, it's appropriate for them [to care for their children]," he told *The Lawyers Weekly*. (words in square brackets added by *The Lawyers Weekly*)

One reason Mr. Schachter took on the government was his firm conviction that men must play a greater role in child-rearing if women are to achieve their full potential in the workplace.

"I felt it was ridiculous to expect women to take full advantage of the great opportunities outside the home if they then had to return to the house afterwards and shoulder all of the household responsibilities," he explained.

"I see fathers taking a greater share of household responsibilities as being an assist to women."⁶⁹

We do not take issue with Mr. Schachter's social objectives. Increased public financial support for all parents has long been a goal of the Canadian feminist movement. The problem with the *Schachter* case is not its goal but the means of pursuing the goal. There is every reason to think that litigation of this sort, initiated by men, seriously endangers the minimal and fragile recognition that women's interests have received in the legislative arena. Indeed, Schachter proposed as a possible solution that biological fathers should be entitled to a share of the biological mother's pregnancy benefits. The Attorney General for Canada argued, moreover, that if any of the benefits provisions violated section 15, the Court should strike them down. Only the Women's Legal Education and Action Fund (LEAF), an intervenor⁷⁰ in the case, argued consistently against reducing or eliminating pregnancy benefits.

The possibility that a court could strike down or reduce pregnancy benefits in response to the *Schachter* challenge was and still is a very real risk. Nobody could have predicted with confidence that Justice Strayer would extend the legislation as he did. There are numerous Charter precedents in which courts have specifically stated that the courts cannot fill in "legislative lacunae".⁷¹ Fortunately, Justice Strayer of the Trial Division of the Federal Court accepted the arguments of the intervenor (LEAF) and did, in fact, both protect pregnancy benefits and expand parental benefits for biological mothers and fathers. It is notable that, in *Schachter*,⁷² Justice Strayer not only accepted the arguments of the intervenor, but also explicitly acknowledged the assistance that the intervenor had provided, saying, "Through its counsel it played a very helpful role during these proceedings."⁷³

The outcome of *Schachter* in the Federal Court Trial Division creates an initial impression that the case has made a positive contribution to women's equality. However, it is far from clear that this will be the final result. The battle to protect pregnancy benefits has probably just begun. The federal government is appealing the Federal Court decision, and Justice Strayer's judgement is suspended, pending the outcome of the appeal.⁷⁴

Given the fact that women are initiating few challenges and men are attacking women's hard-won protections and benefits, the ability to intervene in cases initiated by men is extremely important. In the cases where men are attacking women's protections, the respondents are rarely women. The parties are usually a male applicant or male accused and one or more governments. Women require intervenor status in these circumstances in order to provide women's perspective on the equality issues that directly affect them and to defend the protections they have acquired. There is a great deal to say about women's inequality, little of which has ever been heard in Canadian courts.

Equality Concepts Advanced by Litigants

The underrepresentation of women in sex equality litigation is reflected in the equality concepts being advanced in the courts. In a majority of cases, these equality rights concepts are not in the best interests of women. The theory of equality consistently advanced by male applicants' lawyers is that men have the right to be treated the same as women. This formal equality theory is relied upon repeatedly, even in the face of the most obvious sex-based differences.

For example, in the case of *Re Getty and Crow*,⁷⁵ an estates case concerning title to land, a lawyer representing an elderly man was required to persuade the court that his client would probably not have any more children. The man wanted to sell his land but there was a question about whether he might become a father to children who would have claims against the land. The lawyer sought to rely on an evidentiary presumption that women of an advanced age are incapable of having children. The client being male and the presumption applying only to females, the lawyer argued that his client was being discriminated against.⁷⁶ He contended that section 15 of the Charter means that the presumption about childbearing capacities should be applied identically to men and women, notwithstanding biological differences between men and women.

In the *Re Getty and Crow* example, the concept of formal equality, or same treatment, is at odds with the biological differences between men and women. Whereas reproductive senescence in women is absolute once menstruation ceases, men's loss of reproductive capacity is relatively gradual, and sperm production can occur in men of very advanced years. However, not even in *Re Getty and Crow*, where one might have seen the absurdity of pretending that men and women are identical, did the Court say that it rejected the equality rights model put forward on behalf of the applicant. What District Court Judge Clements said was that he did not have to decide the "vexing problem" of the application of the Charter to men's and women's reproductive capacities.⁷⁷

The argument that equality requires the courts to ignore differences between men and women is prevalent not just in cases involving biological differences between men and women, but also in cases concerning facets of life in which women are socially or economically disadvantaged relative to men. These are the cases in which judicial endorsement of formal equality has its most devastating effects on women because the courts' decisions stand to legitimize real inequality.

For example, in the *Vincer*⁷⁸ case, it was contended on behalf of the male applicant, who was a separated father with joint custody of his children, that the provisions of and regulations under the *Family Allowance Act* discriminate against men because they require that the family allowance cheque be paid to the mother, unless the father has sole custody of the children. In the Federal Court of Appeal, a central argument advanced on behalf of David Vincer was that "the mere fact" that a piece of legislation makes a distinction based on sex constitutes an "unreasonable classification". This argument was reinforced by reference to section 28 which states:

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

On behalf of *Vincer*, it was contended that section 28 strengthens men's claim to be treated the same as women.

Although it is well documented that the negative financial consequences of marriage breakdown are experienced by women primarily, and that the financial position of divorced and separated men often improves,⁷⁹ only one judge out of three indicated that he rejected the equality model put forward by the applicant. Justice Pratte noted that the legislation makes a distinction between men and women but said that the distinction is fully justified by the obvious disparity of income between husbands and wives. Justices Marceau and Stone offered no comment on the merits of the case.⁸⁰

The contention that section 28 requires courts to ignore the realities of women's inequality is a cruel twist on the use for which section 28 was intended. Although it may be noted that its gender-neutral wording belies its purpose (as outlined in the previous two chapters), section 28 was included by the Charter's drafters in response to women's lobby for its inclusion in the Charter. Women wanted to reinforce the section 15 promise of assistance to women in overcoming their position of disadvantage in society.

Unfortunately, Attorneys General have not shown themselves to be vigorous advocates for women's rights either, and often they are no better than advocates for men, in terms of the arguments they place before the courts. In most cases, Attorneys General assume the responsibility for defending impugned legislation. The characteristic posture of the Attorneys General is to defend challenged legislation, even if it is legislation that impinges on the Charter rights of women. There is no shortage of reports concerning cases in which Attorneys General have defended legislation that threatens women's interests.

For example, the party defending the abortion provisions of the *Criminal Code*, in the case of *Morgentaler*,⁸¹ was the Attorney General for Ontario. The government's position on the abortion question was opposed to women's equality. The interpretive arguments put forward in that case by the government lawyers were actually hostile to women's interests. Morgentaler's counsel argued that section 251 of the Code violated women's right to equal benefit of the law. Counsel for the Attorney General for Ontario attacked the sex equality arguments saying:

... for section 251 to be decreed invalid as discriminatory on the basis of sex, it would have to be established that a man seeking an abortion would be required to comply with section 251. Clearly this is an impossibility, and therefore section 251 by its very nature cannot be attacked as discriminatory on the basis of sex, *per se*.⁸²

This argument that women's experiences are inconsequential unless comparable to an experience known to men is a corollary of the requirement that likes be treated alike. It is a mirror image of the arguments put forward by the applicant in *Vincer*.⁸³ Whereas in *Vincer* it was argued that equality requires that courts pretend that there are no differences between men and women, in *Morgentaler* it was contended by government that the differences can be so significant that no comparison is possible.

*Williams v. Haugen*⁸⁴ is another case in which government lawyers argued that if there is no male group available for comparison, the distinction in question cannot possibly constitute discrimination. In *Williams*, the Saskatchewan Department of Justice argued that a one-year limitation period for women's child support claims could not discriminate on the basis of sex because the entire legislative scheme applied to women only.

Although the Attorneys General usually defend challenged legislation, they are apt to do so in a way that either ignores or undermines the substantive equality content of section 15. The position of most Attorneys General is that section 15 is essentially a guarantee of procedural equality.⁸⁵ Counsel for Attorneys General frequently urge the courts to reaffirm a doctrine of judicial deference articulated by the Supreme Court of Canada in relation to the *Canadian Bill of Rights*.⁸⁶ With the possible exception of the Attorney General of Ontario,⁸⁷ Attorneys General in Canada do not accept the concept that the Charter imposes positive obligations on governments to assist disadvantaged groups in achieving equality. It should come as no surprise, therefore, that counsel for Attorneys General do not support the remedy of extension in equality cases involving under-inclusive benefits programs. The example of the *Schachter*⁸⁸ case has already been mentioned.

In *Schachter*, although the Attorney General for Canada defended the two-part pregnancy and parental benefits scheme, he submitted that, if the Court found the scheme unconstitutional, it should strike down parental benefits. The position of the Attorney General for Canada then was that it would rather see adoptive parents' benefits eliminated than see parental benefits extended to biological parents.

Attorneys General are not even consistently strong advocates for the legislation of their own legislatures or parliament. For example, counsel for Attorneys General

typically do not put forward constitutional sex equality arguments to defend laws promulgated because of women's political actions. The case of *Canadian Newspapers Co. v. A.G. Canada*⁸⁹ is illustrative.

In *Canadian Newspapers*, the company asserted the right to publish the name of a sexual assault victim, against her will. Section 442(3) of the *Criminal Code* protects sexual assault victims against involuntary publication of their names. The newspaper company applied under section 24 of the Charter for an order declaring that section 442(3) of the *Criminal Code* violates the freedom of the press guaranteed in section 2(b) of the Charter. Justice Osborne of the Supreme Court of Ontario upheld the provision, under section 1 of the Charter, as a reasonable limit on freedom of the press.⁹⁰

Canadian Newspapers Co. appealed to the Ontario Court of Appeal, adding fair trial rights to its cache of legal arguments. The government lawyers who defended the legislation did not even mention the right of women to freedom from sexual assault or freedom to speak about sexual assault without fear of forced publication of their names. Instead, the legislation was defended solely under section 1 of the Charter as a reasonable limit, intended to facilitate the reporting of crime. In the result, the Ontario Court of Appeal weakened section 442(3), giving courts discretion to deny victims' requests for protection under section 442(3).

It was not until the Supreme Court of Canada level that the importance of section 442(3) for women's rights as distinct from government rights became a part of the case. On October 26, 1987, a coalition of feminist and community service organizations was granted leave to intervene in the case to argue the sex equality issues.⁹¹

To ears that have not heard women talk about the experience of sexual assault or the fear of being sexually assaulted, the goal of facilitating the reporting of crime (by publishing the names of sexual assault victims) can sound as though it is the same thing as the goal of women's equality, making women's equality arguments redundant. But there is a difference. The following excerpts from the intervenor's factum illustrate concretely that difference:

32. Victims of sexual assault are, overwhelmingly, women; perpetrators of sexual assault are, overwhelmingly, men. Sexual violation of women by men is both an indication and a practice of inequality between the sexes, specifically of the low status of women relative to men.

33. Only a fraction of rapes are reported. Only a fraction of reported rapes are prosecuted. Only a fraction of prosecuted rapes result in convictions. Rape sentences are often short. Most rapists, therefore, continue to live in society either undetected or unpunished and unrehabilitated.

34. In sum, victims of sex crimes, largely women, are comparatively disadvantaged relative to the perpetrators of sex crimes, largely men. A systemic situation of inequality between the sexes thus exists in the social practice of sexual violence, the victims of which are women,

and in the operation of the criminal justice system, which *de jure* outlaws sexual violence but *de facto* permits men to engage in it on a wide scale.⁹²

*Seaboyer*⁹³ is another case where constitutional sex equality arguments could have been made by the Attorneys General but were not. In that case, two male accused challenged section 246(6) of the *Criminal Code* on the basis that it violated their rights to a fair trial. Section 246(6) limits the ability of the defence to canvass the past sexual history of a sexual assault victim with anyone other than the accused. Like the provision protecting sexual assault victims against involuntary publication of their names, section 246(6) is a protection for which women's groups lobbied to improve the treatment of women who report sexual assault. Despite this, counsel for the Attorneys General in that case made no reference to the competing constitutional sex equality rights of women.

Further, in the *Borowski*⁹⁴ "fetal rights" challenge, the Attorney General for Canada neglected even to mention in its factum the negative implications that Borowski's position poses for women's section 15 sex equality rights.

Some of the factums filed by counsel for Attorneys General convey an impression that counsel may not understand that women's inequality problem is not that they are different from men, but that they are disadvantaged relative to men. In *Reference Re Family Benefits Act*,⁹⁵ counsel for the Attorney General of Nova Scotia attempted to defend legislation that benefits women, but relied on the same formal equality arguments that are used to undermine women's claims to access to male privileges: "women are differently situated", and therefore can be treated differently. Instead of rejecting the formal model of equality and concentrating on the amelioration of disadvantage as a Charter goal, the Attorney General's counsel supported it in order to justify the benefits for single mothers.⁹⁶

In *Reference Re Family Benefits Act*, Counsel's authority for the proposition that persons who are differently situated may be treated differently was the decision of the Ontario Court of Appeal in *R. v. Swain*.⁹⁷ In *Swain*, the finding that mentally disordered accused persons are "differently situated" from other accused persons operated as a blanket justification for the automatic incarceration of mentally disordered accused persons. The *Swain* case is inimical to the rights of persons with mental disabilities, a group that includes women. It is also a threat to women as women. What women have in common with other equality-seekers is disadvantage, not difference, and it is because of their disadvantage that women and other equality-seekers need legal advocates who can direct the attention of judges to the concept of disadvantage and away from the concept of difference.

Evidence of women's disadvantage from counsel representing Attorneys General in cases involving challenges to laws that benefit or protect women is typically very sparse. This is particularly striking in the cases where section 146 of the *Criminal Code*, which prohibited sexual intercourse with a girl under 14 years of age (statutory rape), was challenged by the accused. For example, in *Lucas*,⁹⁸ the Court commented on the lack of evidence from the Crown, saying that no psychological or sociological evidence had been presented to demonstrate the differences "if any" in the sexuality

of young teenagers that would justify a different protection for females than males. The Court declared the offence of statutory rape unconstitutional and dismissed the charges against the accused. This decision was overturned on appeal on the grounds that section 15 could not be used because the charges were laid prior to its coming into force.

It must be acknowledged that, in some cases, women's rights advocates have also advanced formal equality arguments, saying that men and women should be treated the same. For example, in *Shewchuk*,⁹⁹ a coalition of intervenors, including the West Coast Women's Legal Education and Action Fund, supported the view that special treatment of single mothers was unwarranted and argued in favour of extending the benefit in question to single fathers. Presented with the risk of losing the special programs completely — and the reality of extremely few precedents to support alternatives to formal equality — it is not surprising that women have tried to make the best of formal equality arguments.

However, feminist organizations are attempting increasingly to present substantive equality arguments to the courts and to provide judges with information concerning the realities of women's inequality.¹⁰⁰ One example is the women-run defence in the *Federation of Women Teachers*¹⁰¹ case. The defence in this case consisted of in-depth argument and extensive expert evidence concerning the unequal position of women teachers in the teaching profession and of women in the work force generally. It also documented the silence of the men's federation concerning discrimination against women teachers, the improvements in conditions for women teachers brought about by the women teachers' federation, the historical failure of mixed organizations to recognize and represent women's interests, the capacity of women's organizations to address women's distinctive priorities effectively, the positive recognition that women's advocacy groups have achieved in other societies such as Norway, Sweden, Denmark, and the United States, and the inability of the same-treatment model of equality to rectify existing social imbalances among groups.¹⁰²

The defence in the *Federation of Women Teachers* case was not conducted by counsel for Attorneys General and demonstrated a very different appearance from those cases conducted by them. The factum and the evidence were developed over a two-year period by a team of privately retained feminist lawyers and scholars. The resources and role of women advocates in this case were exceptional. Unfortunately, as a rule, women's organizations have neither the resources nor the standing to be the primary parties in sex equality challenges.

Conclusion

Women have initiated very little sex equality litigation. Men have initiated more than three times as many sex equality challenges as women have. Many of the men's challenges are to legislated protections and benefits such as rape law reforms and unemployment insurance pregnancy benefits, which women fought for in the political arena. To defend their few hard-won gains against men's equality challenges, and to establish a voice for women in the courts, women have been forced to seek the courts' leave to participate in equality litigation as intervenors.

In order to better assess the impact of sex equality litigation, Chapter Four will provide a closer look at the judges' decisions to determine what equality concepts are being adopted by the courts in sex equality cases, and how other important interpretive issues are being resolved.

Endnotes

1. See Appendix A.
2. See Appendix C.
3. See, for example, M.E. Atcheson et al., *Women and Legal Action: Precedents, Resources and Strategies for the Future* (Ottawa: Canadian Advisory Council on the Status of Women, 1984); M. Eberts and G. Brodsky, *LEAF Litigation Year One* (Toronto: Women's Legal Education and Action Fund, 31 March 1986); M. Eberts et al., *Litigation Works: A Report on LEAF Litigation Year Two* (Agincourt, Ont.: Carswell, 30 June 1987); Canada, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada* (Ottawa: Queen's Printer, 1980) at 5A-2, 9:81, 22:55-60, 22:110-111; J.K. Bankier, "Equality, Affirmative Action, and the Charter: Reconciling 'Inconsistent' Sections" in *Research Studies of the Commission on Equality in Employment* (Ottawa: Supply and Services Canada, 1985) (Commissioner: R.S. Abella) at 314 (footnote 10); M.J. Mossman, "Gender, Equality, and the Charter" in *Research Studies of the Commission on Equality in Employment*, *supra* at 297.
4. See Appendix C.
5. *Ibid.*
6. For an example of a "fetal rights" challenge, see *Borowski v. A.G. Canada* (9 March 1989), (S.C.C.), [unreported]; (1987), [1987] 4 W.W.R. 385 (Sask. C.A.). For examples of challenges to sexual assault legislation based on:
 - age, see *R. v. Le Gallant* (1986), [1986] 6 W.W.R. 372 (B.C.C.A.) rev'g (1985), 47 C.R. (3d) 170 (S.C.); *R. v. Halleran* (1987), 66 Nfld. & P.E.I.R. 314 (Nfld. C.A.);
 - freedom of expression, see *Canadian Newspapers Co. Ltd. v. A.G. Canada* (1988), [1988] 2 S.C.R. 122 [hereinafter *Canadian Newspapers*];
 - liberty and fair trial rights, see *R. v. Ferguson* (1987), 16 B.C.L.R. (2d) 273 (C.A.); *R. v. MacDonald* (1987), 79 N.S.R. 215 (S.C.); *R. v. Seaboyer* (1987), 58 C.R. (3d) 289 (Ont. C.A.).
7. (1987), 2 W.C.B. (2d) 73 (Ont. Dist. Ct.) [hereinafter *Wallace*].
8. (1988), [1988] 1 S.C.R. 30 [hereinafter *Morgentaler*].
9. The women's cases that won on s. 15 grounds are: *Re Blainey and Ontario Hockey Association* (1986), 54 O.R. (2d) 513 (C.A.) rev'g (1985), 52 O.R. (2d) 225 (H.C.) [hereinafter *Blainey*]; *Bombair v. Harlow* (1987), [1987] 5 W.W.R. 55 (*sub nom. L.M.B. v. T.H.*) (Sask. Unif. Fam. Ct.); *Power v. Moss* (1986), 61 Nfld. & P.E.I.R. 5 (Nfld. S.C.); *Wallace, supra*, note 7; *Williams v. Haugen* (1988), [1988] 2 W.W.R. 269 (Sask. Unif. Fam. Ct.); *Wilson v. Medical Services Commission of British Columbia* (1988), 30 B.C.L.R. (2d) 1 (C.A.) rev'g (1987), [1987] 3 W.W.R. 48 (S.C.). *Morgentaler, ibid.* won at the Supreme Court of Canada, but not on s. 15 grounds.
10. (1988), 66 Sask. R. 211 (C.A.) [hereinafter *Gorzen*].

11. R.S.S. 1978, c. C-8.
12. *Gorzen, supra*, note 10 at 213.
13. *Ibid.*
14. *Supra*, note 9.
15. *Supra*, note 11.
16. Another family law issue that women have addressed through litigation concerns naming. The decisions on this issue have not been reported. After filing equality rights challenges, women secured amendments to antiquated provisions in a number of jurisdictions, including British Columbia, Ontario, the Yukon Territory, and Prince Edward Island, that had restricted the rights of women to choose their own names and to pass their names to their children. The provisions were vestiges of the patriarchal view that a man's wife and children are his property.
17. (1986), 50 R.F.L. (2d) 127 (B.C.S.C.).
18. R.S.B.C. 1979, c. 121.
19. *Supra*, note 16 at 141.
20. *Ibid.* at 142.
21. *R. v. Oakes* (1986), [1986] 1 S.C.R. 103.
22. See, for example, the *Married Women's Act*, R.S.A. 1980, c. M-7; *Married Women's Property Act*, R.S.B.C. 1979, c. 252; *The Married Women's Property Act*, R.S.M. 1970, c. M-70; *Married Woman's Property Act*, R.S.N.B. 1973, c. M-4; *Married Women's Property Act*, R.S.N. 1970, c. 227; *Married Women's Property Act*, R.S.N.S. 1967, c. 176; *Married Persons' Property Act*, R.S.S. 1978, c. M-6; *Married Women's Property Act*, R.S.Y. 1986, c. 111; *Married Women's Property Act*, R.S.P.E.I. 1974, c. M-6, s. 9.

Legislative amendments have been made in most jurisdictions: *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 55; *An Act Respecting Compliance With the Laws of the Province with the Canadian Charter of Rights and Freedoms*, 1985, S.N.B. 1985, c. 41, s. 8; *An Act to Amend the Contributory Negligence Act, The Married Women's Property Act and the Automobile Insurance Act*, S.N. 1982, c. 33, ss. 2, 3; *An Act to Amend Chapter 176 of the Revised Statutes, 1967, the Married Women's Property Act*, S.N.S. 1986, c. 35, s. 1; *An Act to Revise the Family Law Reform Act*, S.O. 1986, c. 4, s. 64; *Family Law Reform Act*, S.P.E.I. 1978, c. 6, s. 60; *The Equality of Status of Married Persons Act*, S.S. 1984-85-86, c. E-10.3, s. 7.
23. For instance, of the cases noted under the British Columbia *Married Women's Property Act, ibid.*, the husband was driving in each of the following cases: *Dube v. Saville* (1951), [1951-52] 4 W.W.R. 361 (S.C.); *Ferguson v. MacDonald* (1949), [1949] 2 W.W.R. 1130 (S.C.); *Allen v. Nolet* (1967), 60 W.W.R. 247 (C.A.); *Duckhorn v. Duckhorn* (1977), 2 B.C.L.R. 296 (S.C.); *Landstrom v. Ringrose* (1981), 27 B.C.L.R. 339 (C.A.); *Davidson v. Davidson* (1984), 58 B.C.L.R. 116 (S.C.); and *Rudd v. Rudd's Heavy Equipment Repairs*

- Ltd.* (1984), 44 R.F.L. (2d) 100 (S.C.). In *Mendes v. Ferreira* (1981), [1981] 4 W.W.R. 276 (S.C.), the wife was driving.
24. *Grabbe v. Grabbe* (1986), [1987] 2 W.W.R. 657 (B.C.C.A.).
 25. R.S.B.C. 1979, c. 252.
 26. *Davidson v. Davidson Estate* (1986), [1987] 2 W.W.R. 642 (B.C.C.A.).
 27. *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 55.
 28. See *Landstrom v. Ringrose*, *supra*, note 23 at 352-354.
 29. *Shkwarchuk v. Hansen* (1984), 30 C.C.L.T. 121 at 126 (Sask. Q.B.) [hereinafter *Shkwarchuk*], quoting from *Best v. Samuel Fox & Co.* (1951), [1951] 2 K.B. 639 at 665, *aff'd* (1952), [1952] 2 All E.R. 394 (H.L.).
 30. *Supra*, note 9. See also *Shkwarchuk*, *ibid.* in which the Saskatchewan Court of Queen's Bench ruled that damages for loss of consortium would no longer be allowed to husbands because wives had never had access to such a claim; and also *Schierz v. Dodds* (1986), 4 Q.A.C. 20.
 31. (1987), [1987] 4 W.W.R. 167 (Alta. Q.B.).
 32. *Ibid.* at 175-177. The Court applied *Caldwell v. Stuart* (1984), [1984] 2 S.C.R. 603, and *Reference Re An Act to amend the Education Act* (1986), 25 D.L.R. (4th) 1 (*sub nom.* *Reference re Roman Catholic Separate High Schools Funding*) (Ont. C.A.).
 33. R.S.C. 1970, c. I-6, ss. 12(1)(b). See K. Jamieson, *Indian Women and the Law in Canada: Citizens Minus* (Ottawa: Canadian Advisory Council on the Status of Women, 1978); W. Pentney, "The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982" (1988) 22 *U.B.C.L. Rev.* 207.
 34. See, for example, *Twinn v. Canada* (1986), 6 F.T.R. 138 (F.C.T.D.) in which Twinn, an Indian man, and others challenge the 1985 amendments to the *Indian Act*, saying that the amendments infringe the Aboriginal rights of Indian bands to determine their own membership. The federal government opposes the challenge, arguing among other things that the amendments are intended to recognize ss. 15 and 28 rights. This citation refers to a decision concerning an unsuccessful motion by the Crown to strike out the statement of claim.
 35. *Supra*, note 31 at 179.
 36. However, there are no reported cases of men claiming discrimination in circumstances such as these, and there are several such cases involving women employees. See, for example, *Caldwell v. Stuart*, *supra*, note 32, concerning the refusal of a separate school board to renew the contract of a Catholic teacher because she had married a divorced man in a civil ceremony; *Re Essex County Roman Catholic Separate School Board and Porter* (1978), 89 D.L.R. (3d) 445 (Ont. C.A.) concerning the dismissal of a woman teacher for entering a civil marriage; *St. Paul's Roman Catholic Separate School District No. 20 v. CUPE, Loc. 2268* (1982), 3 C.H.R.R. D/915 in which a woman was fired for living in a common-law relationship.

37. *Andrews v. Ontario Ministry of Health* (1988), 9 C.H.R.R. D/5089 (H.C.).
38. (1986), 30 D.L.R. (4th) 639 (F.C.A.).
39. *Supra*, note 17.
40. *Supra*, note 9.
41. *Mia v. Medical Services Commission of British Columbia* (1985), 61 B.C.L.P. 273 (S.C.).
42. *Supra*, note 9.
43. S.O. 1981, c. 53, ss. 19(2).
44. *Blainey, supra*, note 9 at 529.
45. *Horii v. Canada Commissioner of Corrections* (1987) 17 F.T.R. 190 (F.C.T.D.).
46. The availability of interlocutory relief can be very important in equality litigation.
47. *Supra*, note 7.
48. *Supra*, note 8.
49. A majority of the Supreme Court of Canada ruled that the therapeutic abortion provision of the *Criminal Code* (s. 251) violated the right to "security of the person" found in s. 7 of the Charter. Wilson, J.'s decision differed significantly in several respects. In *Morgentaler, supra*, note 8 at 171, she concluded that the right to "liberty" contained in s. 7 includes a woman's right to terminate her pregnancy:

I would conclude, therefore, that the right to liberty contained in s. 7 guarantees to every individual a degree of personal autonomy over important decisions intimately affecting their private lives.

The question then becomes whether the decision of a woman to terminate her pregnancy falls within this class of protected decisions. I have no doubt that it does.

This decision is one that will have profound psychological, economic and social consequences for the pregnant woman. The circumstances giving rise to it can be complex and varied and there may be, and usually are, powerful considerations militating in opposite directions. It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large. It is not just a medical decision; it is a profound social and ethical one as well. Her response to it will be the response of the whole person.

It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma.

For Wilson, J. the right to reproduce or not to reproduce is a right protected by the s. 7 right to liberty. Wilson, J. also concluded that s. 251 violated the s. 7 right to security of the person and the ss. 2(a) guarantee of freedom of conscience.

50. After the decision was rendered Dr. Morgentaler exclaimed, "Bravo for the women of Canada. Justice for the women of Canada has finally arrived." K. Makin, "Abortion Law Scrapped; Women Get Free Choice", *The Globe and Mail*, 29 January 1988 at A-1.
51. See Appendix C.
52. *Family Allowance Act*, 1973, S.C. 1973-74, c. 44.
53. *A.G. Canada v. Vincier* (1987), 82 N.R. 352 (F.C.A.).
54. S.N.S. 1977, c. 8 as amended.
55. *Phillips v. Social Assistance Board (N.S.)* (1986), 73 N.S.R. (2d) 415 (N.S.T.D.), aff'd *sub nom.*; *A.G. Nova Scotia v. Phillips* (1986), 34 D.L.R. (4th) 633 (S.C.A.D.) [hereinafter *Phillips*] relying on *Reference Re Family Benefits Act (N.S.)* S. 5 (1986), 75 N.S.R. (2d) 338 (S.C.A.D.) [hereinafter *Ref Re Family Benefits Act*].
56. R.S.B.C. 1979, c. 49.
57. *Shewchuk v. Ricard* (1986), [1986] 4 W.W.R. 289 (B.C.C.A.). See also *Friesen v. Gregory* (1986), 55 Sask. R. 245 (Unif. Fam. Ct.), in which similar legislation in Saskatchewan was challenged and upheld under ss. 15(2) and 1 of the Charter.
58. *Unemployment Insurance Act*, 1971, S.C. 1970-71-72, c. 48.
59. *Schachter v. Canada Employment and Immigration Commission* (1988), 18 F.T.R. 199 (F.C.T.D.).
60. *Re Tomen and Federation of Women Teachers' Associations of Ontario* (1987), 61 O.R. (2d) 489 (H.C.); and *Tomen v. Ontario Public School Teachers' Federation* (1986), 17 O.A.C. 189 (Div. Ct.).
61. *Weatherall v. A.G. Canada* (1987), [1987] 11 F.T.R. 279 [hereinafter *Weatherall*].
62. *Penitentiary Service Regulations*, C.R.C. 1978, c. 1251, s. 41(2).
63. *Supra*, note 55.
64. *R. v. Ferguson*, *supra*, note 6 (though on s. 7 grounds, not on s. 15 grounds); *R. v. Poirier* (1985), 69 N.B.R. (2d) 1 (Prov. Ct.) [hereinafter *Poirier*]; *R. v. Neely* (1985), 22 C.C.C. (3d) 73 (Ont. Dist. Ct.) [hereinafter *Neely*]; and *R. v. Lucas* (1985), 16 C.R.R. 1 (Ont. Dist. Ct.) [hereinafter *Lucas*]. Both *Neely* and *Lucas* were reversed on the ground that s. 15 was not in force at the time the charges were laid: (1986), 27 C.C.C. (3d) 229.
65. Bill C-15, an Act to amend the Criminal Code and the Canada Evidence Act 1980-81-82-83, c. 125. The position of the Badgley Report on *Sexual Offences Against Children* concerning certain of the gender-specific offences against young women was

cited by Christine Boyle in C.L.M. Boyle et al., *A Feminist Review of Criminal Law* (Ottawa: Supply and Services Canada, 1985) at 63.

Gender-specific offences should be retained for intercourse with females under 14 and 16. The constitutional justification is that female children suffer a unique harm specific to their sex from the insertion of a penis in the vagina. This has the advantage of clear identification of the vulnerable group and the clear placement of responsibility to avoid exploitation of that vulnerability. It also avoids the problems of a gender-neutral version. As long as male children are protected by other provisions, and children [are] protected from sexual abuse by women (even if this is very rare), then it is justifiable to retain a clear provision making it an offence for males to have sexual intercourse with young girls.

66. Exceptions may include *Harden v. Harden* (1987), 54 Sask. R. 155 (C.A.) [hereinafter *Harden*] and three British Columbia cases concerning adoption: *Re MacVicar and British Columbia Superintendent of Family and Child Services* (1986), 34 D.L.R. (4th) 488 (S.C.) [hereinafter *MacVicar*]; *Re F.L.; N.M. v. Superintendent of Family and Child Services* (1986), 10 B.C.L.R. (2d) 234 (S.C.); *Re Nelson M. and Superintendent of Family and Child Services* (1986), 2 A.C.W.S. (3d) 292 (S.C.). In *Harden*, a father appealed a custody order on the basis that the Saskatchewan Court of Queen's Bench had applied the "tender years" doctrine in violation of his equality rights as a father. The Court found that the trial judge had made the custody order in favour of the mother because she had a closer relationship with the children, not because of a bias in favour of mothers. Although the Charter arguments were on the facts, the Court agreed that the tender years doctrine was not a valid doctrine.
67. (1985), 71 N.S.R. (2d) 85 (S.C.T.D.).
68. *Ibid.* at 90.
69. C. Schmitz, "Charter Can Extend UI Benefits to Natural Parents, Fed. Court Holds", *The Lawyers Weekly* (24 June 1988) at 24.
70. The concept of the intervenor in legal proceedings is discussed more fully in Chapter Six.
71. *Hunter v. Southam Inc.* (1984), [1984] 2 S.C.R. 145 at 169, applied in *Phillips v. Social Assistance Appeal Board (N.S.)* (1986), 73 N.S.R. (2d) 415 (S.C.T.D.), and *Phillips, supra*, note 54. As well, courts have struck down legislation that benefited women without any express consideration of extension as an alternative remedy. See, for example, *Weatherall, supra*, note 61; *R. v. Howell* (1986), 57 Nfld. & P.E.I.R. 198 (Nfld. Dist. Ct.); *Lucas, supra*, note 64; and *Neely, supra*, note 64 both rev'd on other grounds, *supra*, note 64; *Poirier, supra*, note 64.
72. *Supra*, note 59.
73. *Ibid.* at 202.

74. Strayer, J.'s reasons for judgement were issued 7 June 1988; however, the final judgement, including the determination as to costs and clarification of the remedy, was issued 30 August 1988.
75. (1985), 52 O.R. (2d) 689 (Dist. Ct.).
76. *Ibid.* at 692.
77. *Ibid.*
78. *Supra*, note 53. See the Memorandum of Points of Argument of David J. Vincer in the Federal Court of Canada.
79. See L.J. Weitzman, "Redefining Alimony" in *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (New York: The Free Press, 1985) at 143.
80. Historically, most sex discrimination litigation arose in cases such as the Persons Cases in which the only issue was whether the law should treat women the same as men when they met the requirements set out for men by the law. The Persons Cases include *In Re Mabel Penery French* (1905), 37 N.B.R. 359, in which the issue was whether a woman was a "person" and therefore entitled to apply to become a member of the Law Society of New Brunswick, and *Edwards v. A.G. Canada* (1929), [1930] A.C. 124, in which the issue was whether women were "persons" and therefore entitled to be summoned to sit as senators. However, as we have seen, this understanding of equality is incomplete because it allows women to be equal to men only so long as and to the extent that they are the same as men. This argument was made in these terms by LEAF in the Supreme Court of Canada in the case of *Brooks v. Canada Safeway* (1986), 7 C.H.R.R. D/3475 (Man. C.A.) [hereinafter *Brooks*]. [Editor's Note: The Supreme Court of Canada reversed the ruling of the Manitoba Court of Appeal in *Brooks*, in a judgement released on 4 May 1989.]
81. *Supra*, note 8.
82. Respondent's Factum at 40 for *Morgentaler*, *supra*, note 8.
83. *Supra*, note 53.
84. *Supra*, note 9. See also *Friesen v. Gregory*, *supra*, note 57, in which legislation was defended on the basis that it applied only to men.
85. This can be seen in the facts of the Attorneys General filed in the Supreme Court of Canada in *Andrews v. Law Society of British Columbia* (2 February 1989), File No. 19955/19956 [hereinafter *Mark Andrews*]. See, for example, the Factum of the Appellant, the Attorney General of British Columbia at 11-25; Factum of the Intervenor, Attorney General of Nova Scotia, citing *McKay v. R.* (1980), [1980] 2 S.C.R. 370 at para. 18 at 9 and para. 25 at 11; and also Mémoire du Procureur Général du Québec Intervenant, also citing *McKay v. R.* at 7.
86. See the Factum of the Attorney General in *Ref. Re Family Benefits Act*, *supra*, note 55 at 28 and the Respondent's Factum at 38 in *Morgentaler*, *supra*, note 8, citing *McKay v. R.*, *ibid.*

87. See the Factum of the Attorney General of Ontario at the Supreme Court of Canada in *Mark Andrews*, *supra*, note 85 and in *Canadian Newspapers*, *supra*, note 6.
88. *Supra*, note 59.
89. *Supra*, note 6.
90. The decision of the Ontario Supreme Court was delivered by Osborne, J., 12 June 1984.
91. Women's Legal Education and Action Fund, Ontario Coalition of Rape Crisis Centres, Barbra Schlifer Commemorative Clinic, Women's College Hospital Sexual Assault Care Centre Team, Metropolitan Toronto Special Committee on Child Abuse, Metro Action Committee on Public Violence Against Women and Children, Broadside Communications Ltd., and Women Healthsharing, Inc.
92. Factum of the Women's Legal Education and Action Fund (LEAF) at 5-6.
93. *Supra*, note 6.
94. *Ibid.*
95. *Supra*, note 55.
96. Factum of the Attorney General at 31 in *Reference Re Family Benefits Act*, *supra*, note 55.
97. (1986), 53 O.R. (2d) 609, leave to appeal to the Supreme Court of Canada granted 26 March 1987, 59 O.R. (2d) 463.
98. *Supra*, note 64.
99. *Supra*, note 57.
100. See LEAF facta filed in the Supreme Court of Canada: *Brooks*, *supra*, note 80; *Janzen v. Platy Enterprises Ltd.* (1986), 8 C.H.R.R. D/3831 (Man. C.A.); *Mark Andrews*, *supra*, note 85.
101. *Supra*, note 60.
102. Factum in the Supreme Court of Ontario of the Respondent, Federation of Women Teachers' Associations of Ontario at 1-30.



CONTENT OF
SEX EQUALITY DECISIONS

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Introduction

A full assessment of the impact of the sex equality decisions handed down by the courts requires consideration not only of the cases' subject matter and outcomes and the litigants' arguments. Consideration must also be given to what theories of equality judges have adopted and how critical interpretive issues have been addressed: the meaning of sections 28 and 15(2), the relationship between sections 15 and 1, the Charter's scope, and the extent of the courts' remedial powers.

These questions are important because the answers reveal a lot about the likely outcome of future sex equality challenges, and we turn now to an examination of the sex equality theories and interpretive principles being applied by the courts. A thematic question runs through this analysis: Are the courts effectively ensuring that the Charter "does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons"?¹

Sex Equality Theory

Formal equality theory is rapidly taking root. Lawyers representing a majority of applicants and Attorneys General have told judges repeatedly that equality is a neutral concept requiring simply that men and women be treated the same; for the most part, judges have agreed. The judges' decisions reflect the belief that same treatment and equality are synonymous.²

Because judges have applied a formal equality model in sex equality challenges made by men, women have suffered setbacks in the courts. One of the more glaring examples of women's loss of ground is the outcome of the *Weatherall*³ case, referred to in Chapter Three. Women prisoners at the federal penitentiary in Kingston lost the protection of a regulation forbidding searches by male guards. The apparent objective of the male inmates was to obtain increased privacy rights and freedom from searches by persons of the opposite sex in the men's prison. In striking down the legislation, Justice Strayer of the Federal Court decided that a protection for women inmates cannot be justified "when there is no comparable legal protection for males".⁴

In the course of applying a formal equality model to the *Weatherall* case, Justice Strayer appears to have ignored completely the reality that unwanted touching by men is a central element of women's inequality in the world and a systemic practice by which they are oppressed and terrorized. As a rule, men do not worry about being dominated sexually and disempowered by women. We do not suggest that the concerns of male inmates be overlooked. They should not be. All prisoners are vulnerable to abuse and exploitation by persons in positions of authority. However, the pattern of subordination of women by means of sexual coercion should be recognized as a real condition of women's lives that is relevant to sex equality claims. It is notable that the case of the male inmates did not rest on claims of fear of sexual exploitation, harassment, or intimidation.

Justice Strayer's judgement does not even mention the relative positions of women inmates and men inmates and does not consider the possibility that the

experience of women who are forced to submit to unwanted touching by men may be more negative than the experience of men forced to submit to such touching by women. His decision reflects a perspective on the problem from the point of view of male guards only. He said:

Expert evidence . . . [was presented] . . . to the effect that male guards, by their inherent maleness, are more likely to exploit such situations as cross-gender searches and surveillance than are female guards. It appears to me that this is exactly the kind of stereotyping which section 15(1) of the Charter was designed to preclude. No court would long entertain an argument for example that black persons, or Baptists, or Scotsmen are, by an allegedly typical defect of character, more likely as a class to exploit their fellow man, thus justifying laws which discriminate against such classes of persons. I see no reason why I should entertain such an argument when directed against the male 'gender'.⁵

Perhaps the widespread pattern of sexual violence and sexual harassment by men against women has nothing to do with "inherent maleness". We hope that Justice Strayer is right. However, in the face of overwhelming statistics indicating that rape is a pervasive problem and that rape and sexual harassment are committed by men against women, what does "negative stereotyping" of men have to do with a regulation that protects women inmates from forced physical contact with men in positions of authority? Should the Court not have been more concerned with protecting women inmates from the harm of sexually coercive conduct than with protecting male guards against negative stereotyping? Stating the fact that, in our society, it is overwhelmingly men who sexually assault and harass women is not stereotyping. Legal protection for subordinate groups should not be identified as stereotyping of the dominant group; it is more properly compared to an affirmative action program. As this case illustrates, the same-treatment model serves women's interests poorly because it prevents the court from seeing and considering the true circumstances of women.

Although the formal model of sex equality enjoys widespread acceptance in the judges' decisions, women do not necessarily receive the benefit of it in the sex equality cases where they are the applicants, because they have to prove that they are similarly situated to another group before the benefit can be applied to them.

As we will show in Chapter Seven, many equality rights challenges dealing with a variety of grounds have foundered on the rocks of the similarly situate test. Strikingly, no men's sex equality claims have failed because a man was unable to show that he was situated similarly to a woman. Cases in which one might have expected the applicants to have difficulty showing that males and females are similarly situated include the challenges to section 146(1) of the *Criminal Code*. In this group of cases, the judgement of the Ontario District Court in *R. v. Neely*⁶ is typical. The Court found discrimination in the statutory rape provision simply on the basis that the charging section only applies to males. The accused was not even required to pass a similarly situate test.

Individualizing Equality Rights

In the court decisions, there is a tendency for women's sex equality problems to be seen as individual problems, not as problems of women as a group. This tendency is evident in a case such as *Casagrande*,⁷ discussed earlier, in which the constitutional right of Roman Catholics in Alberta to establish separate schools was characterized as a "group" right, overriding the individual rights to equality in section 15. This perception is consistent with the way most equality rights cases are argued. Unreasonable classification of individuals, it is argued, is the essence of inequality.⁸

Individualizing equality problems makes the oppression of women as a group invisible and makes it difficult for judges to see why they should grant group remedies. In a dissenting judgement in *Blainey*⁹ at the Ontario Court of Appeal, Justice Finlayson, in spite of finding that the Ontario *Human Rights Code* sanctioned "overt discrimination on the basis of sex", proposed that an appropriate remedy would be to direct the Ontario Hockey Association to "accommodate" Justine Blainey alone because she was a gifted athlete. Although this individual remedy would have addressed Blainey's immediate concerns, it would have done nothing for every other girl and woman in Ontario, who still would have been without legal protection against sex discrimination in sports.

Individualizing women's equality problems also makes it difficult for judges to accept that governments may target certain social programs at groups of people based on the characteristic needs of the group as a whole. Such a program was at issue in the *Ref. Re Family Benefits Act*.¹⁰ The Nova Scotia Court of Appeal also took an individual rights approach to the question of benefits for single mothers, finding that a program of financial assistance for single mothers as a group was not permissible as long as there were some "individual" single fathers who were also in need.

Section 28

Section 28 of the Charter was intended to heighten judges' sensitivity to women's inequality.

During the three-year moratorium before section 15 came into force, there was at least one encouraging sign from the judiciary that section 28 would have a sensitizing effect. On March 18, 1985, in the case of *R. v. Red Hot Video*,¹¹ the British Columbia Court of Appeal upheld the constitutionality of the obscenity provisions of the *Criminal Code*, relying in part on section 28 of the Charter. Concerning certain allegedly obscene materials, Justice Anderson in a concurring minority judgement said:

They exalt the concept that in some perverted way domination of women by men is accepted in our society.

I would add that in determining whether or not the requirements of s. 1 of the Charter have been satisfied, it seems to me that we should not decide these matters in a vacuum but should have regard to the provisions of the Charter as a whole, including s. 28 . . .

If true equality between male and female persons is to be achieved it would be quite wrong in my opinion to ignore the threat to equality resulting from the exposure to male audiences of the violent and degrading material described above. As I have said, such material has a tendency to make men more tolerant of violence to women and creates a social climate encouraging men to act in a callous and discriminatory way towards women.¹²

However, in the 22 decisions referring to section 28 that have been handed down since section 15 came into force,¹³ the courts have been very responsive to men's repeated claims that section 28 reinforces their rights to same treatment. For example, in *Phillips*,¹⁴ *Nelson*,¹⁵ *Re F.L.*,¹⁶ *MacVicar*,¹⁷ and *Neely*¹⁸ at the Ontario District Court level, section 28 was applied in favour of men's equality claims. Similarly, in *Weatherall*, Justice Strayer was of the view that, to the extent that men were subjected to intrusions not "forced on female prisoners", section 28 was violated.¹⁹

Ironically, section 28 has been referred to in only one of the women's sex equality challenges identified in this study. In contrast, it has arisen in 12 of the men's cases.²⁰ It might be useful to know whether women's advocates are neglecting to argue section 28 or if their arguments are being ignored by the courts, but this cannot be determined from the decisions. The only women's sex equality case in which a court has referred specifically to section 28 is *Blainey* at the Ontario High Court of Justice. Justice Steele found that section 28 emphasizes that men and women must be treated the same.²¹ Section 28 was also argued but not considered in *Morgentaler*²² at the Ontario Court of Appeal.

If we look beyond the section 15 sex equality cases, section 28 comes up in aid of women's equality in three more cases — *Red Hot Video*, *R. v. Punch*, and *Szuts*. In the case of *R. v. Punch*,²³ a racial equality case concerning the size of juries in the Northwest Territories, section 28 was raised in support of an argument that women (and ethnic minorities) are more likely to be excluded from a six-person jury than from a twelve-member jury. Justice de Weerd took the section 28 arguments into account and sustained the challenge. In the case of *Szuts*,²⁴ a women's welfare rights case, section 28 is mentioned by Justice Sutherland, but the case is not decided on Charter grounds, and it is not even clear from the decision that Charter arguments were raised by counsel.

There is some discussion in the decisions about whether section 28 has an override function in relation to other provisions of the Charter because of its opening phrase, "notwithstanding anything in this Charter". So far, the discussion favours men's interests. In *Weatherall*, Justice Strayer said that section 28 would have precluded a section 1 limitation on the men's rights.²⁵ This view is also expressed in *Howell*²⁶ by Newfoundland District Court Judge Riche. In *Ref. Re Family Benefits Act*, the Nova Scotia Court of Appeal said that section 28 overrides both sections 1 and 33, the opting-out provision of the Charter.²⁷ In *Blainey*,²⁸ Justice Steele of the Ontario Divisional Court considered whether section 28 would override section 1 to protect women's sex equality, and he said that he did not believe it would.

Finally, there are a number of decisions in which judges express their views concerning limits on the application of section 28. For example, in *Lucas and Neely* at the Ontario Court of Appeal, Justice Morden said:

It is also argued that s. 28 of the Charter . . . operates to make s. 146(1) of the *Criminal Code* invalid. Quite simply, I do not see how the terms of section 28 standing alone and without the benefit of section 15 can accomplish this result.²⁹

In *Weatherall*, Justice Strayer said:

But section 28 adds nothing here because such laws and practices are already invalid by virtue of section . . . 15. Section 28 would have a meaningful impact in this situation only if it were sought to justify such discrimination against men by reliance on section 1. In such case section 28 would preclude a section 1 limitation imposed on the . . . section 15 rights of men alone.³⁰

And in *Shewchuk*, Justice MacFarlane of the British Columbia Court of Appeal said:

I do not think that the presence of section 28 in the Charter does anything more than emphasize and ensure that all the rights and freedoms in the Charter are guaranteed equally to male and female persons.³¹

In conclusion, the decisions to date do not indicate that section 28 has served to sensitize judges to women's inequality. Indeed, to date, the courts are using section 28 to support men's claims more often than to support women's claims.

Sections 1 and (15)2

The trend in the sex equality decisions is to regard section 1 and section 15(2) as exceptions to the principle that individuals who are alike should be treated alike. Section 15(2) is interpreted to mean that governments may implement measures to assist disadvantaged groups, even though such measures violate the equality guarantee of section 15(1). Section 1 of the Charter provides:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 1 is interpreted to mean that governments may balance individual rights against the interests of society as a whole.

Dividing sections 15(1) and 15(2) and talking about 15(2) as an exception to equality produces anomalous results. Let us return to the example of *Weatherall*,³² a case rich in interpretive problems. At issue were regulations pertaining to surveillance of male inmates' cells and various types of body searches for male and female inmates in emergency and non-emergency circumstances. The result was that protection for women prisoners from searches by male guards was struck down, without regard to the women's right to the amelioration of conditions of disadvantage. However, the regulations permitting searches of men inmates by women guards in

emergency situations were upheld, using section 15(2) to support the employment rights of women guards. The Federal Court decided to apply section 15(2) as an exception to the principle of "equality" (in order to preserve employment opportunities created by the government to address the underemployment of women in the prison system), but not to apply section 15(2) to protect women from searches by men. Thus, the case went in two opposite directions.

The application of section 15(2) to the employment rights of women guards is consistent with the language and purpose of the section. In our opinion, the approach of Justice Strayer to the problem of balancing women's employment interests with men's privacy concerns is cogent. We think that the same reasoning should have been applied to the protection for women inmates. What is anomalous is the Court's adherence to a model of equality for section 15(1) that is completely at odds with the concept of equality reflected in section 15(2). An alternative, and, in our view, more coherent approach would have been to find that the regulations do not violate the equality guarantee as a whole because they serve to assist women inmates and women guards to overcome inequality.

A comment of British Columbia Chief Justice Nemetz in *Shewchuk* highlights the danger of reading sections 15(1) and 15(2) as if they contradicted one another: "Focusing only on section 15(1) can blind one to the implications of the second section of the equality rights provisions."³³ That comment followed on his earlier observation that "[i]n order to achieve equality, it is sometimes necessary to require differentiation in treatment."³⁴

Making section 1 an exception to the principle that likes should be treated alike has also produced some strange and highly unpredictable results. Sometimes section 1 arguments succeed, other times they do not. The concept of "reasonableness" is infinitely slippery, discretionary, elusive, and it seems not to have very much to do with assisting women in overcoming inequality. Women are losing more than they are gaining under section 1 of the Charter.

In *Blainey*, the Ontario High Court of Justice regarded section 1 as "[t]he only protection of society as a whole from the individual rights granted in s. 15(1) . . .".³⁵ Justice Steele found that the sex discrimination in the Ontario *Human Rights Code* was a reasonable limit on equality. The reasons are sparse and confusing, but in the main they seem to be that satisfying the "wishes of an individual" would jeopardize the voluntary development of sports by private organizations, and that "while individual females such as Justine may be able to compete in hockey with men for a short number of years, females generally cannot compete successfully with men in hockey because of physiological differences."³⁶ Once again, we see equality rights being individualized and subordinated to other interests, this time a government interest in allowing private sports organizations to discriminate against women.

In *Karen Andrews*,³⁷ as in *Anderson v. Luoma*,³⁸ section 1 arguments were considered. Justice McRae, presumably in *obiter*, said that the refusal of OHIP to recognize lesbian couples was a reasonable limit on equality. Making his heterosexual biases quite clear, he found that the "[l]egislative objective of establishing and maintaining traditional families is one of substantial importance."³⁹

Occasionally, section 1 considerations seem to have a mediating effect on the same-treatment model of equality. For example in *Shewchuk*,⁴⁰ gender-specific legislation was upheld by a majority of the British Columbia Court of Appeal on section 1 grounds, and defences to challenges of the statutory rape provision have succeeded in a number of courts on section 1 grounds. But one has to ask why section 1 is being used to justify section 15 violations. Why do judges behave as though they have to wait until the section 1 stage of an inquiry to take evidence of social concerns into account and to look beyond the individual concerns of the parties before them?

Why do judges talk about reasonable limits on equality but not about equality itself? If a challenge is made to a gender-specific provision that assists women in overcoming inequality, should it not simply be found to be in accord with section 15? Even in the cases where section 1 has been applied to rescue legislation that assists women, it is not clear that women's equality aspirations enter into the court's considerations of what is a reasonable limit on same treatment. It looks more as though courts are concerned about protecting women for the good of the state rather than for the good of women.

For example in *Shewchuk*, the "discriminatory" child support and paternity provisions were found to be a reasonable limit on equality because they helped the state to pursue the valid objectives of obtaining financial assistance for a mother and child and of relieving itself of the obligation to provide it.⁴¹ In the statutory rape cases in which the offence provision was saved under section 1, courts expressed similar concern about the state interest in preventing teen pregnancies, indicating a kind of benevolent paternalism but not respect for the dignity and security of young women.⁴² Though section 1 assists in the outcome in these cases, it is not a reliable check against the perversities of the same-treatment model of equality.⁴³

In some sex equality cases, the courts have injected the concept of reasonableness into section 15 prior to the section 1 stage of an inquiry, saying that only discrimination that is unfair, invidious, irrational, or unreasonable violates section 15. We think that such an approach, first articulated by the British Columbia Court of Appeal in the *Mark Andrews*⁴⁴ case, threatens to water down the sex equality guarantee and cause a number of other problems.⁴⁵ Though that observation applies with equal force to other grounds of disadvantage, it may be a particularly dangerous barrier to women's sex equality claims because of the established nature of discrimination against women as a group.

For example, one Canadian legal scholar supported the idea of a reasonableness barrier within section 15, providing the following illustration to support his position:

... suppose that a municipal beach had a policy (not "prescribed by law") prohibiting topless sunbathing by women, though permitting it by men. A woman who took issue with the policy and wanted to attack it under the Charter would have to prove more than the fact that it treated men and women differently. She would, I believe, be required to persuade a court that it is "unreasonable and unfair" in normal circumstances to prohibit upper body nudity by women in public and permit it by men.⁴⁶

It is notable that the British Columbia Court of Appeal's reasonableness barrier has rarely been erected by the judges to shut out men's sex equality claims.⁴⁷ The adherence to the gender-neutral definition of equality in the men's cases is remarkably consistent. In *Ref. Re Family Benefits Act*⁴⁸ and in *R. v. Neely* at the Ontario District Court level, the reasonableness barrier was explicitly rejected. In *R. v. Neely*, District Court Judge Killeen said:

In my view, it would be dangerous in the extreme to import the element of injustice, or motive, or reasonableness or unreasonableness, as the case may be, into the term discrimination, because over the long haul the importations of these open-textured limitations on the concept of discrimination will water down the strength of the concept that Parliament was developing in enacting s. 15(1). I do not think that the court should read down the great strength of s. 15 by importing language into it which will water down the great constitutional principles which s. 15 reflects.⁴⁹

Remedies

The issue of Charter remedies is a crucial one for women. The remedial sections of the Charter are 52 and 24. Section 52 states:

52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Section 24 reads:

24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Section 52 allows a court to make a declaration that a law or policy is inconsistent with the Charter. This has the effect of making a law or policy inoperative to the extent of its inconsistency. Section 24 can be interpreted to give the court broad discretion to remedy the identified inconsistency.⁵⁰

Depending on the wording and structure of the provision in question, a court may be able to resolve an equality problem by striking down a few key words, leaving the provision intact. Moreover, in some circumstances the effect of striking down legislation is in fact to extend benefits. In the *Blainey*⁵¹ case for example, the Ontario Court of Appeal extended the benefit of human rights protections, but it did so by striking down an exemption provision and without acknowledging the extending effects of their decision.

However, what women will need more often in sex equality cases is the explicit extension of benefits formerly available to men only, and other results-oriented remedies such as supervision orders, compensation, and structural relief requiring governments or others to act to eliminate the causes of inequalities.

Sections 15 and 24 read together provide the basis for a generous approach to remedies in equality cases. Section 24 allows the court to make any award that is appropriate and just in the circumstances, and a purposive approach to section 15 requires concern for effective remedies. Disadvantaged groups will not be assisted by timid and technical awards.

That said, the courts' treatment of remedies issues in the sex equality cases to date is not encouraging. The reaction of most judges to perceived equality rights violations, as if by reflex, has been to strike down. Women have lost protections and benefits because judges struck down provisions rather than doing something more innovative.

Judges are more familiar and comfortable with the negative power of the courts to strike down than with the courts' positive power to extend benefits or protections. As they did under the *Canadian Bill of Rights*, judges continue to profess reluctance to interfere with the intentions of the elected legislators through their rulings, and they consider that extension is a greater interference than striking down. However, this is not a distinction that makes a great deal of sense. It is arguable that, in cases such as *Phillips*⁵² and *Weatherall*,⁵³ striking down was more intrusive than extending benefits would have been,⁵⁴ and, as noted above, the effect of striking down in *Blainey* was actually to extend. In any event, the question about an appropriate and just remedy in a section 15 case should not be whether the means is the least intrusive. It should be: What is required to give the equality guarantees effect? For, without effective section 15 remedies, there are no section 15 rights.

There has been only one women's sex equality case in which a court explicitly extended a benefit. That was the case of *Power v. Moss*,⁵⁵ in which the right to damages for loss of consortium was extended to women. One other women's sex equality case that stands out because of the remedy granted by the Court is *Wallace*,⁵⁶ discussed in Chapter Three. In imposing a fine rather than a prison sentence, the judge in *Wallace* was providing a creative remedy uniquely suited to the circumstances of the inequality, in this case limited prison facilities for women.

It is not that judges are necessarily enthusiastic about striking down legislation. It is just that, unless judges recognize the substantive equality content of section 15, they are likely to regard striking down as the sole and inevitable consequence of a ruling of unconstitutionality. Formal equality that dictates the same treatment for everyone does not distinguish between equalizing up, by expanding benefits and protections, and equalizing down, by reducing benefits and protections, to eliminate legislative distinctions. Judge Riche, who decided the sexual assault case of *R. v. Howell*,⁵⁷ applied formal equality principles to sexual assault and then found himself reluctantly striking down the law. He said:

The purpose of s. 15 of the *Charter of Rights and Freedoms* is to give equal rights and opportunity to all Canadians without discrimination on the basis of sex. This legislation although fundamentally desirable may for a period cause some rather unfortunate problems for existing laws. For better or for worse it may sweep away legislation which heretofore granted special status and protection to women.⁵⁸

Exceptions to the rule that judges do not repair or extend laws in equality rights cases can be found in men's equality cases. There are a number of sexual assault cases in which men have been remarkably successful at obtaining innovative remedies. In the cases of *R. v. R.*⁵⁹ and *R. v. Holway*,⁶⁰ the protection of non-publication orders formerly available only to victims in sexual assault cases was extended to accused persons. In the case of *R. v. L.*, which concerned a buggery charge, the benefit of the defence of consent, which is not available under this provision of the *Criminal Code* to those under 21 years of age, was extended to a man under 21.⁶¹ An even more notable exception is the remedy granted by Justice Strayer in the *Schachter*⁶² case, expanding parental leave. We think the *Schachter* decision so important that it will be dealt with again at the end of this chapter.

The Scope of the Charter's Application

The scope of the Charter's application is defined by section 32:

32.(1) This Charter applies

- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
- (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

It is clear from this section that the Charter applies to both federal and provincial governments in their law-making and administrative capacities. Policies and practices of governments, as well as laws and regulations, are challengeable. Also, other bodies operating under statutes or as creatures of government, such as Crown corporations, are within the reach of the Charter. The Charter is clearly intended to govern relations at least between governments and citizens and to control government action.

Some commentators have argued that this is the limit of the Charter's application, that it is not intended to apply to non-governmental entities such as corporations or unions.⁶³ Others have argued that section 32 should not be interpreted in such a limited way. They say that section 32 exists to make certain that the Charter applies to government, but that it does not preclude the Charter's application to non-governmental actors.⁶⁴

To convey a broad impression of the law on this issue, it is necessary to look beyond the cases involving sex equality challenges. To date, courts have ruled that the Charter applies to municipalities,⁶⁵ a hospital,⁶⁶ a community college,⁶⁷ law societies regulating the conduct of their members,⁶⁸ Cabinet decision-making,⁶⁹ CanadaPost,⁷⁰ and administrative law bodies, such as arbitration boards.⁷¹ They have ruled that the Charter does not apply to real estate boards regulating the conduct of their members,⁷² universities as employers,⁷³ a school board as employer,⁷⁴ private commercial contracts,⁷⁵ or private clubs.⁷⁶

In *Dolphin Delivery*,⁷⁷ which is the major case on the question of the Charter's scope, the Supreme Court of Canada held that the Charter applies to the legislative,

executive, and administrative branches of government and to their actions, but that it does not apply to private litigation between parties where no government action is involved. The facts of this case are that Dolphin Delivery Ltd. sought an injunction to prevent the Retail, Wholesale and Department Store Union, Local 580 from picketing its premises, on the grounds that the union was attempting to induce it to breach its contract for service to a third party, contrary to the common law. In turn, the union argued that an injunction would interfere with its Charter right to freedom of association because it would prevent the union from protecting its members' rights by picketing.⁷⁸

At the Supreme Court of Canada, a central issue in *Dolphin Delivery* was whether the Charter applied to the granting of an injunction and the common law on which it would be based. The Court held that the Charter applies to the common law but only insofar as the common law is the basis of some governmental action; thus, the Charter does not apply to the common law in its regulation of relationships among private actors. Accordingly, because the dispute in *Dolphin Delivery* was characterized as purely private, the Charter was held not to apply, and the union's Charter arguments were rejected.

There have been three important sex equality decisions concerning the scope of the Charter's application. One is *Power v. Moss*,⁷⁹ in which section 15 was applied to a discriminatory provision that was part of the common law. Justice Aylward said:

The reference in 52(1) to any law that is inconsistent with provisions of the *Constitution* includes the common law as well as statutory law. The *Charter* applies to the courts and the courts applies [sic] statutory law and common law. Surely the court should not, in its application of common law, apply rules that violate specified rights guaranteed to individuals in the *Charter*. A rule of common law that specifically authorizes an abridgement of a guaranteed *Charter* right must be held to be of no force or effect.⁸⁰

However, after *Power v. Moss* was decided, the Supreme Court of Canada handed down *Dolphin Delivery*,⁸¹ limiting the circumstances in which the Charter applies to the common law. *Dolphin Delivery* calls into question the precedential value of the Newfoundland Supreme Court's decision in *Power v. Moss*. For women this is unfortunate because, as the *Power v. Moss* case illustrates, the common law is sexist. And although some of the more notorious examples of sexism in the common law, such as the incapacity of women to sue, vote or hold property, have been abolished by statute, a disturbing implication of *Dolphin Delivery* is that women could be legally defenceless against "private" acts of sex discrimination if governments repealed statutes giving women rights they did not have at common law. There is no tort of discrimination at common law.⁸²

*Blainey*⁸³ is another sex equality case in which an important decision concerning the scope of the Charter's application was made. The Ontario Court of Appeal held that the Charter could not prevent the Ontario Hockey Association from discriminating on the basis of sex, because even though it was the recipient of public funding

and it used publicly funded facilities, the Court viewed it as a private organization. Writing for a majority of the Court of Appeal, Justice Dubin said:

1. By s. 32(1), the *Charter* is specifically made applicable only to the Parliament and government of Canada and to the legislature and government of each province "in respect of all matters within the authority" of the respective legislative body. Thus, although legislative and executive actions are covered by the *Charter*, it is not made applicable to private action.
2. Section 15 refers to equality before and under the **law**, as well as equal protection and benefit of the **law**. Thus, although an anti-discrimination (human rights) law would **itself** have to conform to s. 15, it, and not s. 15, would be directly applicable to discriminatory actions by private persons.
3. Every jurisdiction in Canada has an anti-discrimination statute which is explicitly made applicable to the Crown. It is unlikely, therefore, that a complainant would resort to a constitutional action in the courts, rather than the complaint process under the anti-discrimination laws.⁸⁴ (emphasis in original)

The notion of the majority in *Blainey*, that human rights laws will provide protections where the *Charter* does not, is erroneous.⁸⁵ As the *Blainey* case itself illustrated, human rights protections are limited. For example, not all human rights statutes include protection from discrimination on the grounds of sexual orientation. Further, human rights laws are limited in their scope, by not applying to all activities.⁸⁶ As well, at present in Canada, the enforcement of human rights laws is neither efficient nor vigorous.⁸⁷ This means that being able to choose between a *Charter* challenge and a human rights complaint, where coverage is overlapping, is useful.⁸⁸

The third sex equality decision in which a court ruled on the scope of the *Charter's* application is the *Federation of Women Teachers*⁸⁹ case, in which it was held that the *Charter* did not apply to the internal bylaws of the *Federation*. Justice Ewaschuk's comment on the issue reflects a mix of sentiments:

It is now resolved that the *Charter* is not the universal panacea that legal scholars expected it to be. The *Charter* is not all things to all persons but has a limited reach as was intended by its drafters. The *Charter* was designed to restrain governments from abusing fundamental individual (and more limited group) rights and freedoms, but only those rights and freedoms particularized in the *Charter*. The *Charter* was designed to protect individuals from government tyranny. The *Charter* was *not* designed to permit individuals to tyrannize other private individuals or groups in the name of individual rights. The *Charter* was *not* designed to permit absolute individual freedom so as to result in unbridled anarchy, as opposed to ordered liberty. The *Charter* was primarily designed solely to protect individuals from governmental abuse.⁹⁰

The tendency of the courts to make a public/private distinction in relation to the Charter is an important issue for women because it is central in determining how useful the Charter will be in overcoming inequality. Historically, women have been relegated to the private sphere as wives and mothers and denied access to the public world of law and politics.⁹¹ Despite the fact that women today are involved in many more activities, access to equality may continue to be blocked if the courts persist in both expanding the definition of what is "private" and placing that "private sphere" beyond the reach of the Charter. This public/private distinction may rob women of the full benefits of sections 15 and 28. The problem that women have in so many situations is not that government is acting in a directly abusive fashion, but that government is doing nothing or not doing enough to stop discrimination against women. Cutting off the application of the Charter to the so-called "private" sphere is another way of failing to stop discrimination against women. As with remedies, a purposive approach to the Charter requires an expansive approach to the application of the Charter. If section 15 is to assist women and other disadvantaged groups, it must reach to the places where disadvantage is experienced.

Ironically, just as courts are deciding that non-governmental discrimination is immune from Charter review, governments are increasing the size of the private sphere by privatizing a wide range of social services. Where services are moved from a government or a public agency to a private agency, women's ability to use the Charter to assert equality rights in the provision of those services may well be lost.

The situation of women who have been institutionalized because they have been labelled mentally disabled provides an example of how rights may be affected in the process of privatizing services. Disability rights advocates are lobbying for the closure of all mental institutions and for the desegregation of persons with mental disabilities. They want persons with mental disabilities to live in communities and to be integrated into regular schools and workplaces.⁹² And while there is no question that deinstitutionalization is necessary to advance equality for this group which has been segregated and forgotten, the price may be a reduction in Charter rights.

While living in a government-run institution, a mentally disabled woman who is beaten or sexually abused⁹³ can invoke the Charter's protections of her equality and security of the person and can challenge the government's failure to protect her. However, if the same thing occurs in a community group home run by a private operator or a non-profit society, the woman may not be able to use the Charter, even though the government funds her community living.⁹⁴ While she may be able to take civil, criminal, or human rights proceedings against the assailant, this is very different from being able to challenge the government for its failure to ensure that the services it funds comply with the requirements of the Constitution.

It may seem strange that the argument in the *Federation of Women Teachers*⁹⁵ case in favour of a narrow application of the Charter was raised by a women's organization. However, it is to be expected that unless women can obtain rulings from the courts that promote their substantive equality, they will retreat from the courts and the Charter. It must be remembered that the women teachers were trying to protect their organization, which was under attack by men teachers. The very real risk facing the women's organization in this case was that the court would

strike down a structure designed to promote women's equality. Their first line of defence was to explain to the court why the separate women's organization is necessary. But in view of the equality rights precedents to date, it should not be surprising that the women's back-up position was that the Charter ought not to be applied to them.

New Directions

While many of the trends in sex equality litigation have negative implications for women, one very important decision stands apart from the rest and offers reason for optimism that women may still benefit from the sex equality guarantee.

That outstanding decision is *Schachter*⁹⁶ made by Justice Strayer of the Federal Court. *Schachter* comes after the *Weatherall*⁹⁷ decision, also by Justice Strayer, and indicates a significant shift in his views. In *Schachter*, Justice Strayer could have reduced pregnancy benefits for women in order to achieve symmetry on the face of the law for men and women, but he explicitly declined to do that, saying that "the position of the father cannot be 'equalized' by depriving the natural mother of benefits the rationale for which can only apply to her."⁹⁸ Instead, he extended parental benefits (as distinct from pregnancy benefits) to mothers and fathers. Justice Strayer also rejected the idea that women's access to child care/parental benefits should be restricted. He said:

While perhaps amounting to formal equality, such a regime could not produce equality of result . . . in any amended regime designed to achieve equality for natural parents, the natural mother should not be precluded from entitlement to child-care [parental] benefits, in whole or in part, by reason of having received pregnancy benefits within the same benefit period.⁹⁹

The *Schachter* decision is positive because it recognizes the needs of women that are particular to them as women and because it recognizes that there is a difference between equalizing up and equalizing down. The only regrettable thing about the *Schachter* decision is that, when dealing with the issue of benefits for adoptive parents as opposed to biological parents, Justice Strayer indicated that it would be acceptable for the government to either extend or dispose of their current parental benefits for adoptive parents. If the government eliminated the parental benefits, there would be no benefits for *Schachter* to challenge, but it would be a net loss of benefits for women because adoptive mothers would lose those they currently have.

It is important to note that the federal government is currently appealing the decision of Justice Strayer in *Schachter*, on the grounds that the Federal Court did not have jurisdiction to extend benefits as it did. For women, it is disappointing to learn that when a court does take a purposive approach to equality rights, government will oppose it.

Conclusion

There is every indication that the courts are very much in need of effective equality rights advocacy from women. In general, the courts are treating women's sex equality claims and men's sex equality claims as if both groups already have equality. This is an approach that works to the advantage of men and to the detriment of women.

Schachter, an exceptional decision in this dismal pattern of decisions, bears the mark of an intervenor. Our strongest hope — that the direction of equality rights decision-making will change — is based on the capacity of women to make successful interventions. The Supreme Court of Canada has reserved judgement on a number of important cases in which women participated as intervenors.¹⁰⁰ The outcome of these cases will be very telling. But even if the results of the interventions are positive and the damage of men's sex equality challenges thereby minimized, increased proactive strategic litigation by women will also be required if women are to make positive gains. Women's voices need to be heard more often in more courtrooms.

Endnotes

1. *Edwards Books and Art Ltd. v. R.* (1986), [1986] 2 S.C.R. 713 at 779.
2. This is indicated by the relationship the judges accord to ss. 15(1) and 15(2). See, for example, *Friesen v. Gregory* (1986), 55 Sask. R. 245 (Unif. Fam. Ct.), in which Judge Dickson found that a law which benefited women but not men necessarily discriminated against men. He did not even consider the possibility that different treatment might not constitute discrimination under the circumstances. He then went on to ask "is that discrimination excused by s. 15(2)?" (at 247-248) and to find that it was.
3. *Weatherall v. A.G. Canada* (1987), [1987] 11 F.T.R. 279 [hereinafter *Weatherall*].
4. *Ibid.* at 303.
5. *Ibid.*
6. *R. v. Neely* (1985), 22 C.C.C. (3d) 73 (Ont. Dist. Ct.) [hereinafter *Neely*].
7. (1987), [1987] 4 W.W.R. 167 (Alta. Q.B.).
8. See para. 20 of Memorandum of Points of Argument of David J. Vincer (F.C. File No. A-132-87).
9. *Re Blainey and Ontario Hockey Association* (1986), 54 O.R. (2d) 513 (C.A.) rev'g (1985), 52 O.R. (2d) 225 (H.C.) [hereinafter *Blainey*].
10. *Reference Re Family Benefits Act (N.S.) S. 5* (1986), 75 N.S.R. (2d) 338 (S.C.A.D.) [hereinafter *Ref Re Family Benefits Act*].
11. *R. v. Red Hot Video Ltd.* (1985), 18 C.C.C. (3d) 1 (B.C.C.A.) [hereinafter *Red Hot Video*].
12. *Ibid.* at 22-23.
13. *Blainey*, *supra*, note 9; *Hosinger v. Kilmer* (1984), 12 C.R.R. 276 (Ont. Prov. Fam. Ct. Div.); *Re Boudreau and Lynch* (1984), 16 D.L.R. (4th) 610 (N.S.S.C. (A.D.)); *Re MacVicar and British Columbia Superintendent of Family and Child Services* (1986), 34 D.L.R. (4th) 488 (S.C.) [hereinafter *MacVicar*]; *R. v. Punch* (1985), [1986] 1 W.W.R. 592 (N.W.T.S.C.); *Twinn v. Canada* (1986), 6 F.T.R. 138 (F.C.T.D.); *R. v. Thorburn* (1986), 26 C.C.C. (3d) 154 (B.C.C.A.) [hereinafter *Thorburn*]; *R. v. Lucas* (1985), 16 C.R.R. 1 (Ont. Dist. Ct.) [hereinafter *Lucas*]; *Ref Re Family Benefits Act*, *supra*, note 10; *Szuts v. Commissioner of Social Services* (1986), 13 O.A.C. 200; *R. v. L. (Lee Allen)* (1986), 16 W.C.B. 483 (Ont. Prov. Ct.); *Re M.* (1987), 78 N.S.R. 383 (Co. Ct.); *R. v. Barrons* (1985), 70 Alta. R. 107 (Q.B.); *R. v. Bearhead* (1986), 27 C.C.C. (3d) 546 (Alta. Q.B.) [hereinafter *Bearhead*]; *Shewchuk v. Ricard* (1986), [1986] 4 W.W.R. 289 (B.C.C.A.) [hereinafter *Shewchuk*]; *Weatherall*, *supra*, note 3; *Re F.L.; N.M. v. Superintendent of Family and Child Services* (1986) 10 B.C.L.R. (2d) 234 (S.C.) [hereinafter *Re F.L.*]; *R. v. Morgentaler* (1985) 52 O.R. (2d) 353 (C.A.) [hereinafter *Morgentaler*]; *R. v. Howell* (1986), 57 Nfld. & P.E.I.R. 198 (Nfld. Dist. Ct.) [hereinafter *Howell*]; *Neely*, *supra*, note 6; *R. v. Perkins* (1987), 59 C.R. (3d) 56 (N.W.T.S.C.) [hereinafter *Perkins*]; *Red Hot Video*, *supra*, note 11.

14. *A.G. Nova Scotia v. Phillips* (1986), 34 D.L.R. (4th) 633 (S.C.A.D.) relying on *Ref Re Family Benefits Act*, *supra*, note 10.
15. *Supra*, note 13.
16. *Ibid.*
17. *Ibid.*
18. *Supra*, note 16.
19. *Weatherall*, *supra*, note 3 at 303.
20. *Thorburn*, *supra*, note 13; *Lucas*, *supra*, note 13; *Re M.*, *supra*, note 13; *R. v. Barrons*, *supra*, note 13; *Bearhead*, *supra*, note 13; *Shewchuk*, *supra*, note 13; *Weatherall*, *supra*, note 3; *Re F.L.*, *supra*, note 13; *Howell*, *supra*, note 13; *Neely*, *supra*, note 6; *MacVicar*, *supra*, note 13; *Perkins*, *supra*, note 13.
21. *Supra*, note 9.
22. *Supra*, note 13.
23. *Ibid.*
24. *Ibid.*
25. *Supra*, note 3 at 303.
26. *Supra*, note 13 at 203.
27. *Supra*, note 14 at 352.
28. *Supra*, note 9 at 236. This decision was overturned on appeal, *supra*, note 9; however, this particular point was not addressed by the Ontario Court of Appeal.
29. (1986), 22 C.C.C. (3d) 229 at 235.
30. *Supra*, note 3 at 303.
31. *Supra*, note 13 at 305.
32. *Supra*, note 3.
33. *Supra*, note 13 at 294.
34. *Ibid.* at 293. This echoes a statement made by Dickson, J. (as he then was) in *R. v. Big M Drug Mart Ltd.* (1985), [1985] 1 S.C.R. 295 at 347 where he wrote: "In fact, the interests of true equality may very well require differentiation in treatment."
35. *Supra*, note 9 at 234.
36. *Ibid.* at 236.

37. *Andrews v. Ontario Ministry of Health* (1988), 9 C.H.R.R. D/5089 (H.C.).
38. (1986), 50 R.F.L. (2d) 127 (B.C.S.C.).
39. *Supra*, note 37 at D/5092.
40. *Supra*, note 13.
41. *Ibid.* at 307-308.
42. See, for example, *Bearhead*, *supra*, note 13 at 551.
43. See, for example, *Ref Re Family Benefits Act*, *supra*, note 10.
44. *Andrews v. Law Society of British Columbia* (1986), [1986] 4 W.W.R. 242 (B.C.C.A.) [hereinafter *Mark Andrews*].
45. See, for example, *Re F.L.*, *supra*, note 13, where Huddart L.J.S.C. wrote that she could not "conceive of any provision that fails the ultimate test set out in *Mark Andrews* being saved by this provision."
46. D. Gibson, "Canadian Equality Jurisprudence: Year One" in S.L. Martin and K.E. Mahoney, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) at 139. Gibson's view that prohibiting women from uncovering certain parts of their bodies may be "reasonable" is shared by Iranian authorities who recently warned women that they may be punished by up to 74 lashes if they wear see-through stockings in public. The State Security Council warned women in April 1989 that laws requiring "Islamic way" will be strictly enforced. Violations of those laws include exposing the hair in a vulgar way, wearing clothes that accentuate body curves, and wearing see-through stockings not covered by trousers. *The Globe and Mail*, 19 April 1989.
47. For example, in *Ref Re Family Benefits Act*, *supra*, note 10, the Court specifically rejected the test of reasonableness in *Mark Andrews*. In *Schachter v. Canada Employment and Immigration Commission* (1988), 18 F.T.R. 199 (F.C.T.D.) at 206-207, Strayer, J. said the jurisprudence was uncertain and that he would consider the evidence with particular regard to the less onerous test established in *Smith, Kline & French Laboratories Ltd. v. A.G. Canada* (1986), [1987] 2 F.C. 359 (C.A.). Nevertheless, he considered whether the plaintiff had met the more onerous requirements of *Mark Andrews*. The reasonableness barrier was applied to uphold s. 146 of the *Criminal Code* in the case of *R. v. S. (R.)*, (29 April 1987), B.C.J. No. 1255 (B.C. Co. Ct.).
48. *Ibid.* at 351.
49. *Ibid.* at 77.
50. For discussion of available remedies, see *supra*, note 46 at 143-150.
51. *Supra*, note 9.
52. *Supra*, note 14.
53. *Supra*, note 3.

54. D. Gibson, *supra*, note 46 at 145-147, argues that in *Phillips*, *supra*, note 14, extension would have been less intrusive than the course chosen by the courts.
55. *Power v. Moss* (1986), 61 Nfld. & P.E.I.R. 5 (Nfld. S.C.).
56. (1987), 2 W.C.B. (2d) 73 (Ont. Dist. Ct.).
57. *Supra*, note 13.
58. *Ibid.* at 203.
59. (1986), 28 C.C.C. (3d) 188 (Ont. H.C.).
60. (19 August 1985), (Ont. Prov. Ct.), [unreported].
61. [1985] D.R.S. 19-512 (Ont. Div. Ct.).
62. *Supra*, note 47.
63. See, for example, K. Swinton, "Application of the Canadian Charter of Rights and Freedoms (Ss. 30, 31, and 32)" in W.S. Tarnopolsky and G.-A. Beaudoin, eds., *Canadian Charter of Rights and Freedoms: Commentary* (Toronto: Carswell, 1982) at 41.
64. D. Gibson, "The Charter of Rights and the Private Sector" (1982) 12 *Man. L.J.* 213; "Distinguishing the Governors from the Governed: The Meaning of 'Government' Under Section 32(1) of the Charter (1983)", 13 *Man. L.J.* 505.
65. *Hardie v. District of Summerland* (1985), 68 B.C.L.R. 244 (C.A.).
66. *Stoffman v. Vancouver General Hospital* (1988), 21 B.C.L.R. (2d) 165 (C.A.).
67. *Douglas/Kwantlen Faculty Association v. Douglas College* (1988), 21 B.C.L.R. (2d) 175 (C.A.).
68. *Re Klein and Law Society of Upper Canada; Re Dvorak and Law Society of Upper Canada* (1985), 50 O.R. (2d) 118, and *Black v. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439 (Q.B.), rev'd. on other grounds (1985), [1985] 5 W.W.R. 284 (Alta. C.A.).
69. *Operation Dismantle Inc. v. R.* (1985), [1985] 1 S.C.R. 441.
70. *Canadian Union of Postal Workers v. Canada Post Corp.* (1987), 40 D.L.R. (4th) 67 (Q.B.). But see *Bartello v. Canada Post Corp.* (1987), 62 O.R. (2d) 652 (H.C.). In this case the Court found that, while Canada Post may be subject to the Charter in certain of its activities, the Charter does not apply to its contracts with its employees, which are private.
71. *Roy v. Hackett* (1987), 62 O.R. (2d) 365 (C.A.).
72. *Peg-Win Real Estate Ltd. v. Winnipeg Real Estate Board* (1985), 34 Man. R. (2d) 127 (Q.B.).

73. *Harrison v. University of British Columbia* (1988), 21 B.C.L.R. (2d) 145 (C.A.); *McKinney v. University of Guelph* (1987), 63 O.R. (2d) 1 (C.A.) [hereinafter *McKinney*].
74. *Re Ontario English Catholic Teachers Association and Essex County Roman Catholic School Board* (1987), 58 O.R. (2d) 545 (H.C.).
75. *Re Bhindi and British Columbia Projectionists Local 348 of International Alliance of Picture Machine Operators of the United States and Canada* (1986), 29 D.L.R. (4th) 47 (C.A.).
76. *Russo v. Ontario Jockey Club* (1987), 62 O.R. (2d) 731 (H.C.).
77. *Retail, Wholesale & Department Store Union, Local 580 v. Dolphin Delivery Ltd.* (1986), [1987] 2 S.C.R. 573.
78. In the Supreme Court of Canada, the appellants abandoned any appeal on the basis that the injunction infringed its freedom of association. The appeal was limited to freedom of expression. The appellants argued "that picketing is a form of expression fully entitled to Charter protection . . ." *Ibid.* at 587.
79. *Supra*, note 55.
80. *Ibid.* at 18.
81. *Supra*, note 77.
82. *Bhadauria v. Board of Governors of Seneca College of Applied Arts and Technology* (1981), [1981] 2 S.C.R. 181.
83. *Supra*, note 9.
84. *Ibid.* at 521. Dubin, J. is quoting from W.S. Tarnopolsky, "The Equality Rights (Ss. 15, 27, and 28)" in *supra*, note 63, 395 at 423.
85. For a discussion of the relationship between human rights legislation and the Charter, see S. Lederman and A. Ristic, "The Relationship between Federal and Provincial Human Rights Legislation and Charter Equality Rights" in L. Smith et al., eds., *Righting the Balance: Canada's New Equality Rights* (Saskatoon: Canadian Human Rights Reporter, 1986) at 83.
86. They apply only to employment, accommodation, public services, purchase of property, and membership in professional associations and trade unions.
87. See S. Day, "Impediments to Achieving Equality" in *Equality and Judicial Neutrality*, *supra*, note 46 at 402.
88. See also the *McKinney* decision, *supra*, note 73, from the Ontario Court of Appeal which presents a similar problem. The Ontario Court of Appeal also finds that the Charter does not apply to universities. In addition, it finds that the restricted protection against age discrimination offered in the *Ontario Human Rights Code*, 1981 S.O. 1981, c. 53, s. 19(2), protecting only those between ages 18 and 64, is a reasonable limit within the meaning of s. 1. This means that discrimination against those 65 and over is acceptable,

at least in the university employment context, and persons 65 and over can resort neither to the Charter nor to human rights law for protection.

The majority in the *McKinney* decision ruled that s. 1 can be applied on a case-by-case basis to the restricted definition of age in the Ontario *Human Rights Code, 1981*. They find that not protecting those over 64 is a reasonable limit in the university context, but may not be in another context. Blair, J. in dissent finds that it is wrong to apply s. 1 on a case-by-case basis to a statutory provision of this kind.

89. *Re Tomen and Federation of Women Teachers' Associations of Ontario* (1987), 61 O.R. (2d) 489 (H.C.).
90. *Ibid.* at 505-506. One can only assume that Ewaschuk, J.'s reference to the Charter as a "universal panacea" is sarcastic. A panacea is a cure. A cure is something required because of a disease or illness. Although systemic discrimination in a culture is an illness, Ewaschuk, J. apparently does not see it that way. What he sees is "ordered liberty" and the threat that, if people are given equality rights, "unbridled anarchy" will result. This is a strange view, to say the least. If unbridled anarchy is likely to result from anything, it is from the accumulated frustration women and other disadvantaged groups feel about not being recognized as equals in the ordered liberty of this society. The idea that giving people equality rights in a non-governmental sphere is different from giving them equality rights in a governmental sphere does not apply to the realities of women's lives. Women are oppressed by non-governmental employers who harass them sexually and undervalue their work, by men they live with, by men on the street, and by commercial pornographers and pimps.
91. See Zillah Eisenstein, *The Radical Future of Liberal Feminism* (New York: Longman, 1981) at 15, 160, 181.
92. See *Replacing Institutions: The Challenge to End Segregation: A Call for Action to the Government of Canada by the Canadian Association for Community Living* (Downsview, Ont.: Canadian Association for Community Living, June 1988).
93. See C.Y. Senn, *Vulnerable: Sexual Abuse and People with an Intellectual Handicap* (Downsview, Ont.: The G. Allan Roeher Institute, 1988). This study indicates that mentally disabled people are more likely, not less likely, to be victims of sexual abuse.
94. See *McKinney*, *supra*, note 73 at 16. The Ontario Court of Appeal did not accept government funding as a determinant of Charter application.
95. *Supra*, note 89.
96. *Supra*, note 47.
97. *Supra*, note 3.
98. *Supra*, note 47 at 216.
99. *Ibid.* at 215.

100. *Andrews v. Law Society of British Columbia* (2 February 1989), File No. 19955/19956; *Brooks v. Canada Safeway* (1986), 7 C.H.R.R. D/3475 (Man. C.A.); *Janzen v. Platy Enterprises Ltd.* (1986), 8 C.H.R.R. D/3831 (Man. C.A.). The latter two cases are concerned with the meaning of "sex discrimination" in the context of the *Manitoba Human Rights Act*. [Editor's Note: The Supreme Court of Canada reversed the rulings of the Manitoba Court of Appeal in *Brooks* and *Janzen*, in separate judgements released on 4 May 1989.]

THE EQUALITY CASES

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Introduction

For women and other disadvantaged groups, the body of section 15 cases is baffling and disappointing. The cases are not about systemic inequality. They are about drunk driving, marketing boards, the regulation of airline landing fees, and the manufacture of pop cans. Disadvantaged groups do not figure in the majority of these cases. The principal players are corporations, persons charged with criminal offences, government departments, and Attorneys General.

In this chapter, we provide a detailed description of the 591 cases decided to April 17, 1988 and describe the role of disadvantaged Canadians in them. These cases are listed in Appendix A and notes on the database are included in Appendix B.

The Subject Matter of the Cases

Criminal Cases

The largest body of cases is criminal cases¹ in which section 15 has been argued by accused persons in their defence. Criminal cases account for 172 of the 591 cases. Among these 172 cases are 49 impaired driving cases, 39 cases dealing with criminal procedure, 29 sexual offence cases, 17 cases concerning the Attorney General's powers in criminal procedures, 7 cases challenging rape shield laws, 4 cases dealing with the *Criminal Code* provision regarding the defence of insanity, 3 cases dealing with the dangerous offender provision, 8 cases dealing with highway traffic offences, and 16 cases dealing with sentencing, prison, and release.

The impaired driving cases described in Chapter Seven are typical. These cases challenge charges for refusing to provide a breath test on the grounds that the defendant was not being treated in the same way as persons in other provinces where the roadside breath test provision in the *Criminal Code* was not yet proclaimed.² This group also includes cases challenging the non-proclamation in some provinces of the curative treatment provision in the *Criminal Code*, which allows persons charged with impaired driving to be discharged with an order that they undertake treatment for alcoholism. The issue in both sets of cases was inequality in the law based on province of residence.

Thirty-nine cases deal with challenges to criminal procedure. Some are cases challenging the use of police officers as prosecutors in Newfoundland. Accused persons in these cases argued that police prosecutors seek convictions for self-serving reasons and are therefore improper prosecutors. Because police officers are authorized to act as prosecutors in Newfoundland only, these cases have been argued on the grounds of discrimination based on province of residence.³

Some cases deal with jury selection. The Crown's authority to refuse more prospective jurors than the defence during the jury selection process has been challenged,⁴ as has the provision that allows the empanelling of juries of six in the Northwest Territories (NWT), as opposed to the usual jury of twelve.⁵ The most interesting of these cases is *R. v. Punch*⁶ in which the NWT Supreme Court ruled that section 561 of the *Criminal Code*⁷ violated section 15 of the Charter. Unlike any other place in Canada, the majority of the NWT population is of Aboriginal

origin; as a result, the Court found, "place becomes race", and the assignment of juries of only six persons where Aboriginal people are the majority constitutes racial discrimination. In addition, the Court ruled that juries of six are less likely to contain women and members of minority groups.

The lack of representation of Aboriginal people on a jury has been challenged by a Cree defendant on the grounds that he was not being tried by a jury of his peers. In this case,⁸ the accused argued that sections 15 and 25⁹ should entitle him to a jury that includes at least six persons who belong to his race and culture and speak his language. Of 148 prospective jurors, only two were Indian and only one Indian was selected. The Manitoba Court of Appeal rejected this argument, ruling that the equality provisions do not require a jury composed entirely or proportionately of persons belonging to the same race as the accused. To interpret the Charter in this way, it said, would run counter to Canada's multicultural and multiracial heritage and the right of every person to serve as a juror. It would result in inequality.

The court's use of the Charter's multicultural rights section (section 27¹⁰) seems particularly ironic here, since it simply reinforces the dominance of white culture over Aboriginal people. In light of the inequalities that Aboriginal people face in the criminal justice system,¹¹ the treatment given this issue seems hasty.

The 29 sexual offences cases are principally challenges by male accused to provisions of the *Criminal Code* that make certain acts, like sexual intercourse with a female under 14 years of age, offences for men and not for women. Other cases in this group are challenges to evidentiary restrictions in the sexual assault provisions which, male accused argue, hinder their ability to present their defence. These cases are discussed in Chapter Three.

Some of the cases dealing with the Attorney General's powers in criminal procedure challenge the power to prefer an indictment. When an Attorney General prefers an indictment, he/she lays a criminal charge directly in his/her own name, and the usual steps in criminal procedure are not followed. An example of these cases is *R. v. Ertel*,¹² in which Ertel, who was charged with a drug offence, argued unsuccessfully that his section 15 rights had been violated because, when he was charged by way of a preferred indictment, he lost the right to a preliminary hearing and to elect trial by jury. Persons charged in the ordinary way have these procedural safeguards available to them.

Other cases in this group deal with the Attorney General's power to stay proceedings, that is, to delay acting on criminal charges indefinitely. In *Re Baker and R.*,¹³ the parents of a child who was killed by a car laid charges of dangerous driving and criminal negligence against the driver. These charges were stayed by the Crown prosecutor, who had laid charges for lesser offences. The parents challenged the prosecutor's right to stay the charges.

A small group of cases challenge the provisions in the *Criminal Code* dealing with the defence of not guilty by reason of insanity. This group includes the *Swain* and *Rebic* cases, which are discussed in Chapter Seven.

Another small group of cases deals with the dangerous offender provision of the *Criminal Code*.¹⁴ This provision allows a court to declare a person a dangerous offender and sentence him or her to an indeterminate¹⁵ sentence. One of the cases in this group is *R. v. Noyes*,¹⁶ in which the prosecutor sought a declaration that Robert Noyes, who pleaded guilty to 19 counts of indecent assault and sexual assault, was a dangerous offender. Noyes argued unsuccessfully that the application for the declaration violated section 15 on the grounds of province of residence because no applications for dangerous offender declarations are made by the Crown in some provinces.

The fact that criminal cases are a large part of the equality rights case law means that accused persons and their defence lawyers have a significant influence on interpretations of the equality guarantees. This is not reassuring, since the interests of women and the criminally accused rarely coincide.

Interpretations that may assist criminally accused persons, such as fair process and the requirement of same treatment, will not support adequately the substantive equality claims of women. Sometimes, the interests of criminally accused persons are directly opposed to those of women, as in the cases dealing with statutory rape and sexual assault. As well, some criminal defence counsel are openly opposed to women's efforts to obtain better legal protections for rape victims and increased enforcement of sexual assault laws.¹⁷

In addition, because of the nature of its work, the criminal defence bar is not well-acquainted with human rights law and equality rights concepts. Equality arguments that could be made are not made; and often the equality arguments that are made are framed very narrowly.¹⁸ Also, the focus of the criminal defence bar is on the individual rights of the accused although it is clear that legitimate arguments can be made regarding the systemic inequality experienced by women, Aboriginal people, and persons with physical and mental disabilities in the criminal justice system.¹⁹ For all these reasons, the criminal defence bar is not likely to consider the impact of its arguments on women and other disadvantaged groups. While the criminal law issues can seem remote from equality rights issues, because the criminal cases are the daily bread of the courts, they necessarily have a significant impact on how the courts perceive equality issues.

Economic Regulation

Sixty-two cases deal with economic regulation. This group includes cases like *Aerlinte Eireann Teoranta v. Canada*,²⁰ an unsuccessful challenge by a number of airlines to the fees charged by Transport Canada for transoceanic, as opposed to domestic and international landings. In *Smith, Kline & French Laboratories Ltd. v. A.G. Canada*,²¹ the holders of medical patents argued unsuccessfully that they received less favourable treatment than holders of other patents. In another case, *Clearview Dairy Farm* argued unsuccessfully that the British Columbia Milk Board's regulation of milk production and milk sales violated section 15 because the regulation interfered with free enterprise.²² The Aluminum Company of Canada²³ challenged unsuccessfully regulations under the Ontario *Environmental Protection Act*²⁴

which delayed the introduction of aluminum pop cans by two years to allow steel can manufacturers to prepare themselves for competition.

The legal arguments advanced in these cases are particularly tortuous, since all are based on unenumerated grounds particular to each case. *Aerlinte*, for example, argued that airlines making landings after transoceanic flights are treated differently than airlines making landings after domestic flights because they are charged higher landing fees, and that this is a violation of section 15 equality rights.

The standing of corporations to initiate section 15 claims was an issue in a number of these cases, and the majority of courts decided that corporations do not have standing to initiate cases under section 15 because they are not individuals.²⁵ Despite this trend in the rulings, corporations will still figure in section 15 litigation because it seems likely that they will be allowed to argue section 15 as a defence to any charge or suit brought against them.

These cases did not lose solely on the grounds of standing, however. In each case the court also found that there was no violation of section 15 for other reasons. The argument that section 15 entrenches a right to unregulated free enterprise was rejected,²⁶ and the courts found that governments had regulated reasonably in these cases.

From the perspective of women, cases dealing with competition among corporations seem remote from real problems of inequality and an inappropriate use of section 15. However, like the criminal cases, these challenges occupy the courts' time and significantly influence interpretations of the equality guarantees.

The Young Offenders Act

Thirty-nine cases involve challenges to the *Young Offenders Act*.²⁷ Many of these are cases dealing with the anomalies created by the introduction of the Act, which saw youths of the same age tried in different courts and subject to different procedures and sentences, depending on the date of their offence and their province of residence. We describe these cases in Chapter Seven. Other cases in this group include challenges to the lack of provision in the *Young Offenders Act* for a preliminary hearing,²⁸ for conditional discharge,²⁹ for serving sentences intermittently,³⁰ and for trial by jury.³¹ The challenges to the lack of provision for serving sentences intermittently, preliminary hearings, and trial by jury lost, but the challenges to the lack of provision for conditional discharge won.

In *R. v. Y.D.*,³² a young offender challenged the establishment by the province of New Brunswick of a superior court as a youth court.³³ The New Brunswick Court of Queen's Bench ruled that the effect of the establishment of the superior court as a youth court was to restrict young offenders' access to prerogative remedies,³⁴ subject them to a more formal forum, and make appeals more complex and costlier. The Court found that young offenders in New Brunswick were not treated the same as young offenders in the other provinces and ruled that the designation violated section 15.

In *R. v. S. (Sheldon)*,³⁵ both the Ontario Provincial Court and the Ontario Court of Appeal found that Ontario's failure to provide diversion programs³⁶ as mandated by the *Young Offenders Act* was a violation of section 15.

Employment

The majority of the 25 employment cases deal with mandatory retirement. Among them are challenges to the mandatory retirement of university professors and librarians,³⁷ teachers employed by a Roman Catholic school board,³⁸ faculty members of a community college,³⁹ judges appointed under the *Federal Court Act*,⁴⁰ and a challenge to the denial of hospital privileges to doctors over 65.⁴¹

Five cases in this group raise crucial issues about the scope of the Charter. In two of these cases, courts found that the Charter applied and that there was a violation of section 15.⁴² In three others, the courts ruled that there was no violation of section 15 because the Charter did not apply to the respondent.⁴³ In two of these cases, the courts also ruled that human rights laws applied and that the limit in the relevant human rights law that resulted in protections from discrimination being available only to those under 65 was a violation of the Charter.⁴⁴ These courts said that the Charter requires an expanded protection from age discrimination in these human rights laws and that employees can obtain protection from mandatory retirement in this way.⁴⁵ Leave to appeal to the Supreme Court of Canada has been granted in four of these cases, which will be heard together in 1989. The Supreme Court's decision on these cases will be important in determining the scope of the Charter's application in section 15 cases.

In four cases,⁴⁶ employees applied for injunctions to prevent their employers from severing the employment relationship until a mandatory retirement challenge could be heard. Two of these applications were successful.⁴⁷

Other employment cases challenged a school board's suspending a teacher without pay because he was charged with a criminal offence,⁴⁸ the armed forces' discharging a woman when she admitted that she was a lesbian,⁴⁹ and the Public Service Commission's refusal to hire a woman because she was not fluent in one of the six languages required for a position with the Canada Employment and Immigration Commission.⁵⁰ All these challenges lost.

Collective Bargaining

Seventeen cases are about unions' rights to protect and represent their members. There are three important cases in this group: *Re Lavigne and Ontario Public Service Employees' Union*,⁵¹ *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery*,⁵² and *A.G. Manitoba v. Metropolitan Stores Ltd.*⁵³

Lavigne challenged provisions in the *Colleges Collective Bargaining Act*⁵⁴ that allowed his union to collect mandatory dues, and to deem all members of a bargaining unit to be on strike when the union declared a strike. Lavigne argued that employees in other fields were not required to pay compulsory dues nor were they subject to similar strike rules. Lavigne won the compulsory dues issue because the Court found that collecting mandatory dues, which might be spent on political actions Lavigne did not support, violated his freedom of association. Lavigne lost on the strike issue.

The Court dealt with it under section 15 and found that college teachers were unique because they were subject to a legislated, province-wide, multi-employer bargaining system and because there was a significant governmental interest in minimizing strikes of public educators. College teachers, the Court found, were not similarly situated with employees in other fields.⁵⁵

The *Dolphin Delivery* case is significant because, as previously mentioned, it is the Supreme Court's first ruling on scope; it indicates that the Supreme Court of Canada considers it necessary to draw some line between private and public spheres. Although section 15 was mentioned in this case, it played no role in the outcome.

Metropolitan Stores deals with a procedural issue. The Manitoba Labour Board was empowered by the *Labour Relations Act*⁵⁶ to impose a first collective agreement. When the union applied to have the Board impose a first contract, the employer commenced proceedings to have that power declared invalid under the Charter and applied for an order to stay the Labour Board's imposition of the contract until the Charter issue was resolved. The Manitoba Court of Appeal granted the stay of proceedings, but the Supreme Court of Canada subsequently set it aside.

There is no good news for unions in these three rulings or in the others in this group. The pattern is that employers or disgruntled employees like Lavigne are using Charter arguments to undermine union protections. To date, section 15 is peripheral, not central, to these cases.

Regulation of Professions

The 17 cases in this group challenge various aspects of the regulation of the professions of law, medicine, and engineering. The cases brought against law societies deal principally with the requirements for membership in provincial law societies and for practising law. The leading case in this group is [Mark] *Andrews v. Law Society of British Columbia*⁵⁷ which has become a very important case because of the B.C. Court of Appeal's interpretation of section 15 and because it is the first section 15 case to be decided by the Supreme Court of Canada. Andrews challenged the requirement of Canadian citizenship for membership in the law society. In other cases, applicants unsuccessfully challenged residency requirements,⁵⁸ successfully challenged rules barring partnerships between resident and non-resident lawyers,⁵⁹ and unsuccessfully challenged rules requiring non-resident lawyers to pay application, enrollment, and appearance fees and to apply for membership in the law society of the province in which they wished to appear.⁶⁰

Doctors also initiated significant challenges to the regulation of their profession. In *Wilson v. Medical Services Commission of British Columbia*,⁶¹ new doctors challenged the Commission's practice of refusing them billing numbers, or of allowing them billing numbers only in certain geographical areas or for temporary locums. The new practitioners argued that this practice violated a number of Charter protections, including section 15. Unfortunately, as previously noted, the section 15 arguments of women doctors received scant attention from the courts in this case.⁶² This challenge lost in the B.C. Supreme Court but won in the B.C. Court of Appeal. The B.C. government has been refused leave to appeal to the Supreme Court of Canada.⁶³

In both Ontario⁶⁴ and Newfoundland,⁶⁵ doctors who were graduates of foreign medical schools challenged requirements that they take further training in order to qualify for registration. The applicants in these cases alleged that the further training requirements effectively discriminate on the grounds of race and ethnic origin. The courts ruled that requiring doctors educated in foreign medical schools to take further training was not a violation of section 15.

Doctors also unsuccessfully challenged peer assessment programs⁶⁶ and a medical services commission's authority to require doctors to repay fees they had received.⁶⁷ Engineers challenged the authority of a professional association to conduct inquiries into unprofessional conduct and negligence.⁶⁸

When these cases are considered with the mandatory retirement challenges, where the significant cases have been initiated by university and college faculty members, librarians, doctors, and judges, it is apparent that the Charter has been most available to professionals to address inequities in their work circumstances; other workers do not figure significantly in the Charter employment litigation.

Civil Procedure

Seventy-eight cases deal with costs, rights to sue/damages, limitation periods, and other issues related to civil and administrative procedure. Some of these cases are interlocutory proceedings in section 15 cases; that is, they are actions to determine the procedure that will be used to hear the main claim. Some of them are cases in which section 15 is used to challenge rules of court.

■ Costs

Twenty-two cases deal with costs, and most were about security for costs. Courts can order applicants who live outside the province to make a payment to the respondent for costs before litigation begins. The rationale for this practice is that if the applicant loses and costs are awarded to the respondent, the respondent may have more difficulty obtaining payment if the applicant lives out of the province. The applicants in these cases argued that the courts' rules on security for costs breach section 15 because they discriminate against out-of-province applicants and against poor applicants whose access to court is compromised if they have to pay costs before they can commence an action.

The most interesting case in this group is *Kask v. Shimizu*,⁶⁹ a decision of the Alberta Court of Queen's Bench. The Court found that the rule on security for costs violated section 15 because its effect was to put a poor woman at a disadvantage with respect to access to the administration of justice because of her lack of money.⁷⁰ The judge took a purposive approach to interpreting the equality guarantees and provided a well-reasoned and articulate judgement. Although this decision stands out, not just in this group of cases but in the whole body of the equality rights case law, unfortunately it was not persuasive with other judges. *Kask v. Shimizu* is followed by the same Alberta court in *Reed v. Shymanski*,⁷¹ but not in *Singh v. Dura*,⁷² *Booth Construction Ltd. v. Estabrook Construction Ltd.*,⁷³ or *Aukema v. Bernier Kitchen Cabinets Inc.*⁷⁴

In Ontario and Quebec, the courts have rejected most challenges to the rules regarding security for costs.⁷⁵ In a Quebec case, *Émile A. Benoit v. Gestion Tex-Di Inc.*,⁷⁶ the Quebec Superior Court ruled that the purpose of security for costs is to provide balance between the litigants. If there were no provision for security for costs, the respondent who is sued by an out-of-province applicant would be at a disadvantage because she/he might not be able to recover costs. The Quebec court also stated that it is not discriminatory to adopt a law whose general application affects poor people more harshly than rich people.

The other notable case in this group is *McBeth v. Dalhousie University*⁷⁷ which established in the Nova Scotia Court of Appeal a lay litigant's entitlement to a cost award. McBeth, who was a law student, defended herself successfully in a suit against the Dalhousie Law School. After she had won, the University refused to consent to costs on the grounds that costs are intended to pay for lawyer's fees and since McBeth had acted on her own behalf, costs would not be appropriate. The Court of Appeal ruled that section 15 was breached if lay litigants were treated differently and found that McBeth was entitled to her costs.

Other cases contested the rules allowing courts to assess costs against a solicitor⁷⁸ as well as the rules that deny cost awards to a law firm representing itself in a suit.⁷⁹

■ Rights to Sue/Damages

There are 16 cases in this group. A number of them challenged the provisions in workers' compensation acts barring civil suits against employers for damages resulting from the death of a worker or from personal injury suffered on the job. Canadian workers' compensation acts require certain employers to pay into a fund from which injured workers receive benefits, and court actions against participating employers are barred. Applicants in these cases argued that access to the courts is an aspect of equality guaranteed in section 15.

The Newfoundland Supreme Court agreed, in *Piercey v. General Bakeries Ltd.*,⁸⁰ that denying the right to sue violated section 15. However, at the Court of Appeal (*Reference Re Sections 32 and 34 of the Workers' Compensation Act, 1983*),⁸¹ the decision was reversed. The Court ruled that the denial of injured workers' right to sue one's employer is an acceptable limit on equality designed to make the scheme workable.

In one Alberta case,⁸² the Alberta Court of Queen's Bench also found that the denial of injured workers' right to sue violated the applicants' section 15 rights.

Unionized employees brought similar challenges to the denial of their right to go to court with their grievances rather than to arbitration as mandated by collective agreements and labour laws. These cases lost.⁸³

Other cases challenged restrictions on damages. Three of these cases dealt with bars against women being compensated for injuries to their husbands or injuries to themselves caused by their husbands.⁸⁴ These cases are described in detail in Chapter Three.

Energy Probe,⁸⁵ a non-profit society concerned with environmental protection, argued that the *Nuclear Liability Act*⁸⁶ violates section 15 because of the limits it places on persons who suffer personal injuries or property damage as a result of nuclear accidents. They argued that persons injured in nuclear accidents are not treated the same as persons injured in other ways. The Ontario High Court of Justice found that Energy Probe and its co-applicant, the City of Toronto, had no standing to make a section 15 challenge because they are corporations not individuals. The Court said that corporations have standing only when section 15 is being used as a defence to civil and criminal liability.

This decision leaves an important standing issue unanswered: who can obtain standing in crucial environmental cases that seek to prevent harm. Such cases will be impossible under section 15 if the courts will recognize only a person directly harmed by an environmental accident. Will the court recognize a concerned individual⁸⁷ who may be harmed in the future?

■ Limitation Periods

Fourteen cases deal with limitation periods. The largest group of these cases challenges the requirement in the *Ontario Municipal Act*⁸⁸ that a person who seeks to sue a municipality for compensation for personal injuries must start proceedings within three months. The results of these challenges are mixed. In *Streng v. Township of Winchester*,⁸⁹ the Ontario High Court of Justice ruled that the limitation period violated section 15 because it treated some persons suffering injuries because of negligence differently than others.⁹⁰ In *Toronto Transit Commission v. City of Mississauga*,⁹¹ the Ontario District Court also found the limitation period discriminatory. However, in *Rosati v. City of Niagara Falls*⁹² and *Sheets v. City of Burlington*,⁹³ the Ontario District Court ruled that the limitation period was not discriminatory and did not violate section 15.

Other cases challenge limitation periods restricting suits against public authorities,⁹⁴ doctors,⁹⁵ and governments.⁹⁶

■ Other Cases re Civil and Administrative Procedure

There are 26 decisions in the general group of civil procedure cases.

When it was ordered to produce documents before a hearing began, K Mart Canada Ltd.⁹⁷ challenged the rules of civil procedure governing discoveries, alleging that insured parties are treated differently than uninsured parties. The Court ruled that there was no section 15 violation and that corporations do not have standing in section 15 cases except perhaps if they are charged with a criminal offence. In another case, Father Don's Natural Products Ltd. unsuccessfully challenged the Federal Court rule requiring companies to be represented by a lawyer though no such requirement is made of individuals.⁹⁸ *The Edmonton Journal* also challenged a rule in the *Alberta Judicature Act*,⁹⁹ which restricts what can be published about matrimonial proceedings. The *Journal* argued that this was a restriction on freedom of expression as well as a violation of section 15 because the rule applied to newspapers and not to other media. The Court found that there was no section 15 violation because the rule did apply to other media.¹⁰⁰

In some cases, the Crown sought to strike claims brought against it. In *Campbell v. A.G. Ontario*,¹⁰¹ Campbell, an anti-abortion advocate, sought a declaration that the Ontario Attorney General's stay of prosecution against Dr. Henry Morgentaler violated Campbell's section 7 and 15 rights. Campbell argued that, as a neighbour of the Morgentaler clinic in Toronto, he was deprived of equal benefit and protection of the law because allegedly illegal acts, that is, abortions, were being performed next door and his premises were placed at greater risk than those of other taxpayers in the city because of the activities of demonstrators expressing their support or opposition to the clinic. The Court struck Campbell's claim on the grounds that his rights were not being violated and fetuses, which he claimed to represent, have no Charter rights. The Court found that Campbell did not have standing to obtain a review of the Attorney General's decision to stay the proceedings. Campbell claimed to have an interest in seeing the criminal laws of the land upheld, but he did not have a genuine interest according to the Court. He was a stranger to the criminal prosecutions of the doctors, and his personal rights were not denied or infringed.

In another case, the Crown applied to the court to strike a claim by the Assembly of the Church of the Universe¹⁰² which sought recognition of its members' use of marijuana as part of religious worship. The Crown's application was denied. The Crown also brought a motion to strike a claim brought by native persons,¹⁰³ alleging that the 1985 amendments to the *Indian Act*¹⁰⁴ infringed the right of Indian bands to determine their own membership. The Crown argued that because the amendments were made to cure the problems created by Section 12(1)(b) of the *Indian Act*, which discriminated against Indian women,¹⁰⁵ section 15 protects the changes and the claim should be struck. The Court refused to strike the claim.

Other cases challenged procedures used in bankruptcy proceedings,¹⁰⁶ challenged an applicant's right to a jury trial in a negligence case against a municipality,¹⁰⁷ and sought to obtain the right for a father to question the affiant who swore that his child was in need of protection.¹⁰⁸

Family Law

There are 32 family law cases, most of which challenge provisions dealing with maintenance orders, paternity suits, divorce settlements, consent to adoption, custody, and guardianship on the grounds that they discriminate because of sex or marital status. Many of these cases are discussed in detail in Chapter Three.

The other cases in the family law group are challenges to the government's authority in the child welfare field. For example, there are challenges brought by Jehovah's Witnesses.¹⁰⁹ In an Alberta case, parents contested temporary custody and protection orders obtained by child welfare officials because the parents refused blood transfusions for their child. The parents alleged discrimination because of religion. The Court ruled that the actions of child welfare officials were justified and that there was no violation of section 15 in the provisions which authorized them. The Alberta Court of Queen's Bench¹¹⁰ reasoned that the *Child Welfare Act*¹¹¹ does not violate section 15 because all parents who refuse consent for medical treatment are treated the same.

In an Ontario case, however, a court ruled that there was discrimination. In *Re L.D.K.*,¹¹² the Ontario Provincial Court found that a 12-year-old child with leukemia was discriminated against on the basis of her age and her religion when she was given blood transfusions against her wishes.

In one case, a family claimed damages from the government for negligence after their children were wrongly apprehended because officials believed that the children were being sexually abused.¹¹³ In another case, adopting parents sought to terminate the access of the natural parents to their children,¹¹⁴ and, in a third case, an adult who was adopted as a child sought access to his adoption file.¹¹⁵ The first of these claims lost and the other two were not decided on Charter grounds. To date, child welfare authorities have survived Charter challenges relatively unscathed.

Social Assistance / Income Security

This group of 25 cases deals with challenges to eligibility requirements for workers' compensation, unemployment insurance, social assistance, pregnancy benefits, benefits for adoptive parents, family benefits, family allowance, veteran's allowance, and legal aid. While the number is relatively small, these cases are important because they deal with Canada's basic social programs. As with the family law cases, the most significant cases in this group allege discrimination on the grounds of sex and marital status. These are discussed in Chapter Three.

There have been some successful challenges. In Quebec, the Superior Court ruled that section 15 was violated in the application of workers' compensation law. The applicant, injured while previous workers' compensation law was in effect, had a relapse when new legislation was in place. His benefits were calculated differently than they would be under the new legislation for a person who was injured and had a relapse.¹¹⁶ The applicant won the benefit of the new law's provisions.

The Federal Court of Appeal ruled in favour of a man who was denied unemployment insurance sick benefits by the Canada Employment and Immigration Commission. This man was arrested and held in hospital at Penetanguishene for psychological assessment. He was then released on bail and, after being found guilty, was placed on probation. He claimed sick benefits for the time he was in hospital at Penetanguishene and was denied them on the grounds that he was in prison, not in hospital. The Federal Court of Appeal reversed the UIC decision and allowed the applicant his benefits. Though the Charter was argued, this case was won on non-Charter grounds.¹¹⁷

In *Silano v. British Columbia*,¹¹⁸ the B.C. Supreme Court ruled that welfare regulations discriminated on the basis of age contrary to section 15 because they required the payment of lower monthly amounts to those under 26 than to those over 26. In practice, this decision was a hollow victory because the B.C. government responded to the ruling by lowering the benefit rates for those over 26.

In another welfare case challenging differential rates based on age, Louise Gosselin won the right to represent others in the same category as herself in a class action challenge.¹¹⁹

In *Bregman v. A.G. Canada*,¹²⁰ a challenge to the *War Veteran's Allowance Act*¹²¹ was unsuccessful. Section 31(4) of the Act provides that veterans of allied forces of the world wars, otherwise qualified, are eligible for a veteran's allowance if they were either domiciled in Canada at the time they joined the allied force, or had resided subsequently in Canada for a total period of at least ten years. Bregman, a World War II veteran, was refused the allowance because he did not meet the residency requirement. He argued that it discriminated against Canadian citizens who had not resided in Canada for ten years, and violated section 15 of the Charter. Both the Ontario High Court of Justice and the Court of Appeal ruled against him. They applied the same-treatment model and found that those who had a "Canadian connection" at the time of service were similarly situated and treated the same; those who resided in Canada after service were not similarly situated.

Democratic Rights

Sixteen cases deal with democratic rights, that is, the right to vote and to hold office.

In an early B.C. case, *Re Hoogbruin v. A.G. British Columbia*,¹²² the *British Columbia Election Act*¹²³ was challenged successfully because it had no provision for absentee voting; this resulted in B.C. residents who were in Ontario at the time of the 1983 election not being able to vote. The B.C. Court of Appeal declared that the *British Columbia Election Act* offended section 3, which guarantees every citizen the right to vote, because the Act contained no provision for absentee or proxy voting. Section 15 was not applied in the *Hoogbruin* case.

In another elections act challenge, *Hedstrom v. Commissioner of Yukon Territory*,¹²⁴ the Yukon Territory Supreme Court held that it did not have to resort to section 15 when there was a violation of section 3. The *Yukon Election Act*¹²⁵ required one year's residency in the Yukon before a person was eligible to vote. The Court found that the residency requirement violated section 3.

As a result of this ruling, the Yukon Territorial Government referred a question to the Court of Appeal to determine if a one-year, six-month, or any residency requirement was unconstitutional. The Yukon Territorial Court of Appeal ruled that the one-year residency requirement did not violate the Charter, including section 15.¹²⁶

In *Brisebois v. Chabot*,¹²⁷ section 15 was used as a defence by a mayor whom applicants sought to unseat and have disqualified from holding office for three years. The applicants took this action because the mayor had violated conflict of interest rules set out in the *Urban Municipality Act*.¹²⁸ The Saskatchewan Court of Queen's Bench disallowed the mayor's section 15 argument that he was being treated differently than other council members because it found that the rules applied to all council members equally. The mayor's seat was declared vacant, and he was disqualified from holding office for three years.

In *Re Weinstein and Minister of Education*,¹²⁹ the Vancouver School Board challenged the power of the Minister to dissolve a duly elected school board following its refusal to submit a budget that complied with Ministry guidelines. The B.C.

Supreme Court found that the school board had no Charter rights, because they are guaranteed to individuals, not to statutory bodies. In addition, it ruled that the citizens of Vancouver were not discriminated against contrary to section 15 because of the government's dismissal of their elected representatives, or, if they were, it was justified under section 1 as a reasonable limit based on significant government interest in the operation of the provincial school system.

In Quebec, Protestant school boards and non-Protestant school trustees successfully challenged a new law making non-Protestants ineligible to vote in elections for Protestant school board members. The Quebec Superior Court declared that this violated section 15.¹³⁰

Language Rights in Court

Sixteen decisions deal with the right of francophones to use French in court. The most significant group are challenges to the non-proclamation in certain provinces of section 462(1) of the *Criminal Code*.¹³¹ This section allows accused persons to obtain a mandatory order directing that a trial be conducted in the language of the accused. Like the drunk-driving provisions of the *Criminal Code* described earlier, this section was to come into force when provinces decided they were ready to implement it.

The courts in different provinces have diverged significantly in dealing with these cases. The British Columbia and Newfoundland courts¹³² ruled that the non-proclamation of the French language section did not violate section 15 because courts in these provinces do not have the practical capacity to conduct trials in French. This reasoning is clearly tautological. These courts say that there is no violation of an equality right if there is no easy remedy for it. Since this pre-empts any section 1 analysis, the onus was not placed on government to prove that implementation was impossible.

The B.C. court also reasoned that the application of section 15 was barred by section 16(3) of the Charter:

16.(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

This is also peculiar reasoning because, in these cases, section 15 was not offered as a limit on the authority of governments to advance the use of English and French, but rather as a support to that authority.

In the Saskatchewan and Alberta courts,¹³³ however, these challenges fared very differently. They won, and in some cases the right to use French in the court was extended to the challenger even though the section of the *Criminal Code* was not in force. The most thoroughly reasoned and most interesting of the decisions on the non-proclamation of section 462(1) of the *Criminal Code* is *Reference Re French Language Rights of Accused in Saskatchewan Criminal Proceedings*,¹³⁴ a decision of the Saskatchewan Court of Appeal. In this judgement, the Court ruled that section 15 was violated by the non-proclamation, and the courts could proceed as though the section was in force. This decision also repudiates the test of reasonableness

developed by the B.C. Court of Appeal in the *Mark Andrews* case and refuses to read limits into section 15.

In other cases, applicants unsuccessfully challenged rules of court in British Columbia requiring that statements of defence be filed in English¹³⁵ and successfully obtained an order that simultaneous translation be provided for a trial in New Brunswick.¹³⁶

Education

A small but significant group of cases (8) deals with minority language education and religious discrimination in schools.

In Alberta and Ontario,¹³⁷ francophone parents sought declarations pursuant to section 23 of the Charter that there were sufficient numbers of francophone children in their area to warrant a school in which French would be the language of instruction. Section 23 contains the Charter's minority language education provisions. In the Alberta case, parents also challenged sections of the *School Act*¹³⁸ that did not provide francophones with a degree of management and control over French-language schools and made the use of the French language in a school permissible but not mandatory. In both cases, the courts found that the numbers of children did warrant a French-language school. The parents also invoked section 15 of the Charter to argue that section 23 gave minority-language students the right to equivalent schools. In the Alberta case, *Mahe v. R.*,¹³⁹ the Court found that the impugned provisions of the *School Act* did not yet acknowledge section 23 because they did not impose obligations on local school boards to provide instruction in French where numbers warranted; no violation of section 15 or 23 was found.

In Ontario, the Court declared that the applicants had the right to a French-language secondary school and provided a very specific remedy. The Court issued an order requiring both the Ontario government and the school board to ensure that French-language secondary school instruction and facilities be equivalent to English-language instruction and facilities in the county by, among other means, providing adequate funding for that purpose. The Court also ordered that specific facilities and types of instruction be made available.

Other cases in this group deal with religion in education. In *Reference Re An Act to amend the Education Act*,¹⁴⁰ the issue was the Ontario government's decision to provide full funding to Roman Catholic secondary schools. Until the time of this bill, public funding had been provided to separate schools for education up to Grade 10.¹⁴¹ The new bill proposed to provide public funding for Roman Catholic separate schools to the end of Grade 13. The bill was opposed by many organizations in Ontario, which argued that it provided benefits to one religious group only and therefore violated section 15. The Supreme Court of Canada ruled that section 93 of the *Constitution Act, 1867*, which protects the privileges that denominational schools had at the time of Confederation, makes them immune from attack under Charter section 2(a), which protects freedom of religion, and section 15. The Court ruled that Bill 30 was constitutional.

In *Re Zylberberg and Director of Education of Sudbury Board of Education*,¹⁴² parents challenged a school's practice of opening and closing the school day with Christian religious exercises on the grounds that it discriminated against children of other faiths. The Ontario Divisional Court found that the religious exercises did not offend section 15, but on appeal the Ontario Court of Appeal ruled in favour of the applicants, finding that the exercises were discriminatory.

Miscellaneous

The remaining small group of section-15 cases deal with: the Crown as litigator, creditor, or prosecutor (10), immigration (9), mandatory seatbelt laws (5), legal rights (11), landlord and tenant laws (5), tax (9), evidence (7), insurance (3), involuntary sterilization (3), and miscellaneous other subjects (22).

As the description of the cases has perhaps made evident, the grounds argued in the majority of these cases are not those enumerated in section 15, nor are they grounds akin to the enumerated grounds, such as marital status, sexual orientation, or social status. The majority of the cases are argued on unenumerated grounds particular to the cases, such as fisherpersons with long boats versus those with short boats, young persons charged with offences before April 1, 1985 versus those charged after, steel pop can manufacturers versus aluminum pop can manufacturers, farmers who have milk quotas versus farmers who do not, persons who refused breath tests in Ontario versus persons who refused breath tests in British Columbia, persons who sue municipalities for negligence versus persons who sue others, and so on.

Just how do women and other equality-seekers figure in this litigation? The following section provides an account.

Equality Litigation and the Disadvantaged

Of the 591 section-15 decisions identified in the course of preparing this report, about two-thirds are reported in full text and one-third are in judgement or summary form. Included in the 591 decisions are cases in which section-15 arguments were peripheral or not considered by the courts and decisions on interlocutory motions and appeals of the same case. We included all decisions in this study to establish a complete picture of what has happened in the first three years of equality rights litigation.

For the purposes of the study a list of categories of disadvantage was developed, reflecting a mix of enumerated and unenumerated grounds. These categories are: Aboriginal person, age-elderly (60 and over), age-youth (18 and under), colour, criminal record, family status, landed immigrant/refugee claimant, gay male, lesbian, marital status, minority linguistic group, mental disability, national or ethnic minority, physical disability, political belief, pregnancy, prisoner, racial minority, religious minority, social status, women, and other.

About each reported decision we asked: Is the person alleging the inequality a member of a disadvantaged group? What are the grounds of disadvantage alleged in this case? What is the disadvantaged person's role — applicant? respondent?

intervenor? not involved? If disadvantaged persons are represented in the case, are they acting individually or with organizational support? What is the effect of the outcome on disadvantaged persons?

Although the decisions in unreported and summary form yielded less information, we were able to identify the ground of disadvantage raised and whether a disadvantaged person initiated the case.

We found from this collected data that 189 of the 591 decisions deal with grounds of disadvantage. That is, a ground of disadvantage is raised in about 32 per cent of the decisions to date. Like the total count of decisions, this is an all-inclusive figure. It counts all cases where an equality argument concerning a disadvantaged group was made, including those where the argument was not made by a member of the group, and those where such arguments were peripheral and not dealt with by the courts. It also includes decisions on interlocutory motions and on appeals of the same case. Further breakdown is needed to reveal fully who is using the equality guarantees and, in particular, who is initiating cases.

In 77 of these 189 decisions, section-15 arguments regarding grounds of disadvantage were made defensively in the course of criminal proceedings. These 77 decisions include such matters as challenges to the lack of provision in the *Young Offenders Act* for preliminary hearings and jury trials and challenges to criminal proceedings conducted in English by accused persons who are francophones.

In an additional 21 decisions, the disadvantaged group affected by the litigation was not a participant, or their interests were being attacked.

When criminal matters in which section 15 was argued defensively are excluded, as well as decisions in which arguments concerning disadvantaged persons were made in their absence, or contrary to their interests, 91 decisions remain in which it can be said that disadvantaged persons initiated section 15 litigation. When decisions on interlocutory proceedings (applications for injunctions, applications to strike statements of claim, etc.) and appeals of the same case are removed, this number is reduced to 66 (see Table on following page).

Women initiated 7 cases during the first three years of equality rights litigation.¹⁴³ The number of cases initiated is similarly small for other disadvantaged groups. Members of national or ethnic minorities initiated 4 cases; 4 cases were initiated by persons with mental disabilities; no cases were initiated by persons with physical disabilities; 1 case was initiated by a member of a racial minority; and 1 case was initiated by Aboriginal persons.

From these major groups — women, Aboriginal peoples, disabled persons, and members of national, ethnic or racial minorities¹⁴⁴ — only 17 cases were initiated during this period.

Nor can it be said that these 17 cases are major challenges to the systemic inequalities these groups experience; they are not. In fact, there is little that qualifies as effective strategic use of the Charter to advance equality.

Number of Cases in which a Disadvantaged Person or Group is the Initiator, by Ground

Group	Number of cases
Aboriginal ancestry	1
Age-youth/elderly	15
Criminal record	1
Family status (person(s) with children)	2
Landed immigrant/refugee claimant	4
Marital status	2
Mental disability	4
Minority linguistic group	5
National or ethnic minority	4
Prisoner	5
Racial minority	1
Religious minority	6
Sexual orientation	1
Social status (poverty)	8
Women	7
Total	66

Conclusion

These findings underscore the seriousness of the problem of access. Corporations, criminally accused persons, and Attorneys General have good access to the courts; women and other disadvantaged groups do not. The figures also demonstrate clearly that women and other disadvantaged groups rarely have the luxury of choosing the timing or the context for making their equality arguments. To the extent that they are present at all, they are thrust into equality rights arguments, and equality arguments are often asides, not the heart of the litigation. In a significant number of cases, equality guarantees are being used to attack the interests of disadvantaged groups, particularly women. All of these factors make it more difficult for disadvantaged groups to obtain from the courts the interpretations of section 15 that are necessary to their advancement and that reflect the larger purpose of the guarantee.

What is most distressing about the body of equality rights litigation to date is a characteristic less apparent in the numbers but much more apparent in reading the whole body of this law. This law is not about equality, as women and other disadvantaged groups know it and need it. There is no serious discourse in these decisions about inequality in Canada, its dimensions, its patterns, its cures. There is no developing discussion, no public conversation about the pervasive disadvantage of certain groups. Instead, most discussion turns on comparisons — the superficial comparisons that formal equality requires.

Endnotes

1. See Appendix A for a table of cases by subject matter.
2. See Chapter Seven for a full discussion of these cases.
3. See *R. v. Hart* (1986), 58 Nfld. & P.E.I.R. 190 (Nfld. C.A.); *R. v. W.H.* (1986), 63 Nfld. & P.E.I.R. 302 (Nfld. S.C.); *R. v. Blundon* (1987), 63 Nfld. & P.E.I.R. 253 (Nfld. S.C.); *R. v. White* (1986), 60 Nfld. & P.E.I.R. 223 (Nfld. S.C.); *R. v. Nolan* (1987), 1 W.C.B. (2d) 221 (Nfld. S.C.T.D.).
4. See, for example, *R. v. Byers* (1987), 36 C.C.C. (3d) 86 (P.E.I.S.C.).
5. See, for example, *R. v. Fatt* (1986), 30 C.C.C. (3d) 69 (N.W.T.S.C.) and *R. v. Punch* (1985), [1986] 1 W.W.R. 592 (N.W.T.S.C.).
6. *Ibid.*
7. R.S.C. 1970, c. C-34, s. 561 provides:

Notwithstanding anything in this Act, six jurors shall be sworn in the Yukon Territory and the Northwest Territories, and in those Territories the accused is entitled to half the number of challenges provided for in section 562, and the prosecutor may not direct more than twenty-four jurors to stand by unless the presiding judge, for special cause to be shown, so orders.
8. *R. v. Kent* (1986), 27 C.C.C. (3d) 405 (Man. C.A.).
9. S. 25 states:

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

 - (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
 - (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.
10. S. 27 states:

This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.
11. Two current inquiries and one recent report have highlighted the problems Aboriginal peoples face when dealing with the criminal justice system: the Donald Marshall inquiry in Nova Scotia, the Manitoba inquiry into the problems Aboriginal people encounter in the criminal justice system, and the Canadian Bar Association Special Committee Report, *Aboriginal Rights in Canada: An Agenda for Action* (Ottawa: Canadian Bar Association Communications, 1988).

12. (1987), 20 O.A.C. 257 (Ont. C.A.), leave to appeal to the Supreme Court of Canada denied, 3 December 1987.
13. (1986), 26 C.C.C. (3d) 123 (B.C.S.C.).
14. Part XXIV of the *Criminal Code*, R.S.C. 1985, c. C-46 (formerly Part XXI of the Code) provides that the Crown may apply to the court to have a person found to be a "dangerous offender" after that person is convicted of a "serious personal injury offence" as defined under the Code and before the individual is sentenced for it. The court may make the finding either on the grounds that the person "constitutes a threat to the life, safety or physical or mental well-being of other persons" or, where the individual has been convicted of a sexual offence, that he "has shown a failure to control his sexual impulses and a likelihood of his causing injury, pain or other evil to other persons through his failure to control his sexual impulses."
15. An indeterminate sentence is one with no determined or preset duration.
16. (1986), 6 B.C.L.R. (2d) 306 (B.C.S.C.).
17. See C. Smith, "'Whack' sex assault complainant at preliminary inquiry", *Lawyers Weekly* (27 May 1988) 22 and E.L. Greenspan and G. Jonas, *Greenspan: The Case for the Defence* (Toronto: Macmillan, 1987) at 204-246. The *Lawyers Weekly* reports on a speech given by Michael Edelson of Addelman & Edelson to the Ottawa Defence Counsel Association in May 1988. Mr. Edelson called laws protecting complainants a "blue print for convicting people of sexual assault." He advised his colleagues to "whack the complainant hard at the preliminary" in order to discourage her from returning to testify in front of a jury. In his book, Edward Greenspan asserts that women's criticisms of the justice system's and the media's handling of sexual assault amounts to intimidation and censorship.
18. See discussion of *R. v. Swain* (1986), 53 O.R. (2d) 609 (C.A.), and *Rebic v. R.* (1986), [1986] 4 W.W.R. 401 (B.C.C.A.) in Chapter Six for examples of the narrow framing of equality arguments in criminal cases.
19. In criminal cases, the courts should be able to grapple with the systemic inequalities they perpetuate or exacerbate, such as society's failure to treat sexual assault as a serious crime, the high incarceration rate of Aboriginal people, the automatic incarceration of persons found not guilty by reason of insanity, and the solitary confinement automatically imposed on deaf persons who are jailed.
20. (1987), 9 F.T.R. 29.
21. (1986), [1986] 2 F.C. 359 (C.A.); (1986), [1986] 1 F.C. 274 (T.D.).
22. *B.C. Milk Board v. Clearview Dairy Farm Inc.* (1987), [1987] 4 W.W.R. 279 (B.C.C.A.).
23. *Re Aluminum Co. of Canada and Ontario* (1986), 55 O.R. (2d) 522 (Div. Ct.).
24. R.S.O. 1980, c. 141, s. 136(b); O. Reg. 623/85, s. 6; O. Reg. 633/85.
25. See Chapter Six for a full discussion of standing and intervention issues.

26. It is important to note, however, that in the doctors' billing number case — *Wilson v. Medical Services Commission of British Columbia* (1988), 30 B.C.L.R. (2d) 1, the B.C. Court of Appeal found that s. 7 did entrench the right of professionals to earn a livelihood. This indicates that Charter rights may provide a footing for resisting economic regulation. Leave to appeal this decision to the Supreme Court of Canada was denied on 3 November 1988.
27. S.C. 1980-81-82-83, c. 110.
28. See, for example, *R. v. G. (K.)* (1986), [1987] 1 W.W.R. 457 (Alta. C.A.), and *R. v. J.C.* (1986), 72 A.R. 119 (Alta. Yth. Ct.).
29. See *R. v. M. (Michael)* (1987), 2 W.C.B. (2d) 459 (Y.T. Yth. Ct.).
30. See *R. v. D.F.G.* (1986), 29 C.C.C. (3d) 451 (B.C.C.A.).
31. See *R. v. R.L.* (1985), 26 C.C.C. (3d) 417 (Ont. C.A.).
32. (1985), 67 N.B.R. (2d) 269 (N.B.Q.B.).
33. The term "superior court" refers to a court with the authority and power to control, regulate, or restrain the acts and proceedings of some other court: *Re Toronto Rlyw Co. and City of Toronto* (1918), 44 O.L.R. 381 (C.A.). Under the *Young Offenders Act*, *supra*, note 27, the provinces and territories may designate a court as a "youth court" for the purposes of administering and applying the Act.
34. Prerogative remedies developed as a means to compel government officials and bodies to act lawfully and perform their duties: H.W.R. Wade, *Administrative Law*, 5th ed. (Oxford: Clarendon Press, 1982) at 33-34. According to Wade, the prerogative remedies consist of:
 - *Certiorari*, which enables a court to nullify the decision of a lower court if it was beyond the lower court's jurisdiction or if the decision was patently contrary to law;
 - *Mandamus*, which is an order commanding government officials or bodies (including lower courts) to carry out their legal duties (if they are failing to do so);
 - *Habeus corpus*, which orders the release of persons who are wrongfully detained; and
 - *Prohibition*, which is an order prohibiting government bodies (including lower courts) or officials from acting beyond their authority (in the future).
35. (1988), 26 O.A.C. 285 (Ont. C.A.).
36. As mandated under s. 4(1) of the *Young Offenders Act*, *supra*, note 27, diversion programs, or "alternative measures" as they are called under the Act, may be used to deal with a young person alleged to have committed an offence instead of judicial proceedings under the Act. The alternative measures under the Act must be part of a program authorized by the province (s. 4(1)(a)). Therefore, the available alternative measures will vary from province to province. In British Columbia, Probation Services (a department of the provincial government) will recommend an individual diversionary plan for a young

person if Crown counsel request it. See L.W. Bernard, "Alternative Measures/Diversion" in *Young Offenders Act Update* (Vancouver: Continuing Legal Education Society of British Columbia) at 2.2.02. In Ontario, the interim alternative measures program, which was put in place after *R. v. S. (Sheldon)*, *ibid.*, includes a range of measures from notes of apology to 50 hours of community service work; R.N. Komar and P. Platt, *Young Offenders Service*, vol. 2 (Toronto: Butterworths, 1984) at 3115.

37. *Harrison v. University of British Columbia* (1988), 21 B.C.L.R. (2d) 145 (C.A.) [hereinafter *Harrison*]; *McKinney v. University of Guelph* (1987), 63 O.R. (2d) 1 (C.A.) [hereinafter *McKinney*].
38. *Re Ontario English Catholic Teachers' Association and Essex County Roman Catholic School Board* (1987), 58 O.R. (2d) 545 (H.C.J.) [hereinafter *Ontario Teachers' Association*].
39. *Douglas / Kwantlen Faculty Assn. v. Douglas College* (1988), 21 B.C.L.R. (2d) 175 (C.A.) [hereinafter *Douglas College*].
40. See *Addy v. Canada* (1985), 22 D.L.R. (4th) 52 (F.C.T.D.).
41. *Stoffman v. Vancouver General Hospital* (1986), 30 D.L.R. (4th) 700 (B.C.S.C.), *aff'd* (1988), 21 B.C.L.R. (2d) 165 (C.A.).
42. *Ibid.*; *Douglas College*, *supra*, note 39.
43. *McKinney*, *supra*, note 37; *Harrison*, *supra*, note 37; *Ontario Teachers' Association*, *supra*, note 38.
44. *McKinney*, *supra*, note 37 and *Harrison*, *supra*, note 37.
45. However, in *McKinney*, *supra*, note 37, the Court, after finding that the human rights protection violated the Charter because it was underinclusive, proceeded to find that even when those over 65 are provided with human rights protections, mandatory retirement was not a violation of human rights law for faculty members and librarians at universities and was justified under s. 1 of the Charter.
46. *Pendergast v. Newfoundland* (1987), 65 Nfld. & P.E.I.R. 57 (Nfld. S.C.T.D.); *International Brotherhood of Electrical Workers, Local 1574 v. Northwestel Inc.* (1986), 1 Y.R. 118 (C.A.) [hereinafter *Northwestel*]; *Hardie v. District of Summerland* (1985), 68 B.C.L.R. 244 (S.C.) [hereinafter *Hardie*]; *Re Bregzis and University of Toronto* (1985), 53 O.R. (2d) 348 (H.C.).
47. *Northwestel*, *ibid.*; *Hardie*, *ibid.*
48. *Noyes v. South Cariboo* (1985), 64 B.C.L.R. 287 (S.C.).
49. *R. v. Sylvestre* (1986), 30 D.L.R. (4th) 639 (F.C.A.).
50. *Headley v. Public Service Commission Appeal Board (Canada)* (1987), 72 N.R. 185 (F.C.A.).
51. (1986), 55 O.R. (2d) 449 (H.C.). [Editor's Note: This decision was reversed by the Ontario Court of Appeal in a judgement released on 30 January 1989.]

52. (1986), [1987] 2 S.C.R. 573.
53. (1987), [1987] 1 S.C.R. 110.
54. R.S.O. 1980, c. 74.
55. [Editor's Note: This decision was reversed on appeal: (30 January 1989), No. 560/87 (Ont. C.A.).]
56. C.C.S.M., c. L10, enacted by S.M. 1984-1985, c. 21.
57. See Chapters Seven and Eight and Postscript: *Mark Andrews* for discussions of this case.
58. *Casey v. Law Society of Newfoundland* (1986), 58 Nfld. & P.E.I.R. 349 (Nfld. S.C.).
59. *Black v. Law Society of Alberta* (1986), 27 D.L.R. (4th) 527 (Alta. C.A.).
60. *Allen v. Alberta* (1987), 78 A.R. 120 (Q.B.).
61. (1987), [1987] 3 W.W.R. 48 (B.C.S.C.), rev'd *supra*, note 26, leave to appeal to the Supreme Court of Canada denied 3 November 1988.
62. See Chapter Three for discussion.
63. Motion for leave to appeal to the Supreme Court of Canada dismissed 3 November 1988.
64. *Re Jamorski and A.G. Ontario* (1987), 38 D.L.R. (4th) 79 (Ont. H.C.J.).
65. *Bakht v. Medical Board (Nfld.)* (1986), 60 Nfld. & P.E.I.R. 176 (Nfld. C.A.).
66. *Charboneau v. College of Physicians and Surgeons of Ontario* (1985), 52 O.R. (2d) 552 (H.C.). (These programs provided for random access to doctors' records, while excluding particular doctors from the program, e.g., those who had practised for less than five years.)
67. *Datta v. Saskatchewan Medical Care Insurance Commission* (1986), 52 Sask. R. 18 (C.A.).
68. *Re Baker v. Association of Professional Engineers (British Columbia)* (1985), 34 A.C.W.S. (2d) 35 (B.C.S.C.).
69. (1986), [1986] 4 W.W.R. 154 (Alta. Q.B.).
70. *Ibid.* at 162.
71. (1986), 46 Alta. L.R. (2d) 191 (Q.B.).
72. (1987), [1987] 4 W.W.R. 549 (Alta. Q.B.).
73. (1987), 55 Alta. L.R. (2d) 157 (Q.B.).

74. (1987), [1987] 5 W.W.R. 122 (Alta. Q.B.).
75. See *Cottle v. Varty* (1986), 2 A.C.W.S. (3d) 62 (Ont. S.C.); *Gerald Shapiro Holdings Inc. v. Nathan Tessis & Associates Inc.* (1986), 13 C.P.C. (2d) 288 (Ont. S.C.); *Isabelle v. Campbellton Regional Hospital* (1987), 38 D.L.R. (4th) 638 (N.B.Q.B.); *Mangold v. 330002 Ontario Ltd.* (1986), 57 O.R. (2d) 716 (Ont. H.C.); *Conkle v. Vitale* (1988), [1988] R.J.Q. 476 (Que. S.C.).
76. (1987), [1987] R.J.Q. 1401 (Que. S.C.).
77. (1985), 68 N.S.R. (2d) 265 (N.S.S.C.) rev'd in part (1986), 72 N.S.R. (2d) 224 (N.S.C.A.).
78. See *Danson v. A.G. Ontario* (1986), 55 O.R. (2d) 1 (Ont. H.C.), and *McLaren v. Mahaffy* (1986), 10 C.P.C. (2d) 243 (Ont. S.C.).
79. *Tory, Tory, DesLauriers and Binnington v. Concert Productions International Inc.* (1986), 14 C.P.C. (2d) 103 (Ont. S.C.).
80. (1986), 61 Nfld. & P.E.I.R. 147 (Nfld. S.C.T.D.).
81. (1987), 67 Nfld. & P.E.I.R. 16 (Nfld. C.A.).
82. See *Re Budge and Workers' Compensation Board* (1987), 42 D.L.R. (4th) 649 (Alta. Q.B.). The ruling in the *Budge* case is problematic because it finds a s. 15 violation in this case, providing a remedy for this particular applicant but no direction on the constitutionality of the law.
83. See *Bartello v. Canada Post Corp.* (1987), 62 O.R. (2d) 652 (H.C.), and *Zakerson v. Jubilee Residences Inc.* (1986), 52 Sask. R. 198 (Sask. Q.B.).
84. See *Power v. Moss* (1986), 61 Nfld. & P.E.I.R. 5 (Nfld. S.C.); *Shkwarchuk v. Hansen* (1984), 30 C.C.L.T. 121 (Sask. Q.B.); *Grabbe v. Grabbe* (1986), [1987] 2 W.W.R. 657 (B.C.C.A.).
85. *Re Energy Probe and A.G. Canada* (1987), 42 D.L.R. (4th) 349 (Ont. H.C.).
86. R.S.C. 1970, c. 29.
87. See Chapter Six for further discussion of standing issues.
88. R.S.O. 1980, c. 302.
89. (1986), 56 O.R. (2d) 649 (Ont. H.C.).
90. See discussion in Chapter Seven.
91. (1987), 8 W.D.C.P. 81 (Ont. Dist. Ct.).
92. (1987), 5 A.C.W.S. (3d) 211 (Ont. Dist. Ct.).
93. (1987), 3 A.C.W.S. (3d) 163 (Ont. Dist. Ct.).

94. See *Mirhadizadeh v. Ontario* (1986), 56 O.R. (2d) 441 (Ont. H.C.); *Papamonopoulos v. Board of Education for the City of Toronto* (1985), 1 W.D.C.P. 448 (Ont. Dist. Ct.), rev'd (1986), 56 O.R. (2d) 1 (Ont. C.A.).
95. See *Sawh v. Petrie* (1986), 72 N.S.R. 316 (C.A.) and *Bera v. Marr* (1986), 27 D.L.R. (4th) 161 (B.C.C.A.). However, these cases do not rule on the application of s. 15 because in both cases s. 15 was found not to be in effect at the relevant time.
96. *Kurolak v. Minister of Highways and Transportation (Sask.)* (1986), [1986] 4 W.W.R. 323 (Sask. Q.B.).
97. *K Mart Canada Ltd. v. Millmink Developments Ltd.* (1986), 56 O.R. (2d) 422 (H.C.), motion for leave to appeal denied (Ont. S.C.) (1986), 6 W.D.C.P. 378.
98. See Chapter Four for discussion of this case. *Father Don's Natural Products Ltd. v. Canada* (1986), 65 N.R. 62 (F.C.A.).
99. R.S.A. 1980, c. J-1, s. 30.
100. *Re Edmonton Journal and A.G. Alberta* (1985), 22 D.L.R. (4th) 446 (Alta. Q.B.), aff'd (1987), 78 A.R. 375 (C.A.). The *Edmonton Journal* lost on the freedom of expression ground as well, with the Court of Queen's Bench and the Court of Appeal finding that if s. 2 was breached, the restriction was a reasonable limit on the s. 2 right and therefore saved by s. 1.
101. (1986), 58 O.R. (2d) 209 (Ont. H.C.).
102. *Assembly of the Church of the Universe v. R.* (1985), 15 W.C.B. 422 (F.C.T.D.).
103. *Twinn v. Canada* (1986), 6 F.T.R. 138 (F.C.T.D.).
104. R.S.C. 1970, c. I-6; *An Act to Amend the Indian Act*, S.C. 1985, c. 27.
105. See Chapter 1 discussion of the *Canadian Bill of Rights* challenges brought by Lavell and Bedard to s. 12(1)(b) of the *Indian Act*.
106. *Re Smoke* (1987), 9 W.D.C.P. 245 (Ont. S.C.); and *Multiform Manufacturing Co. v. R.* (1987), [1987] R.J.Q. 879 (Que. S.C.).
107. *Crupi v. Royal Ottawa Hospital* (1986), 12 C.P.C. (2d) 207 (Ont. Dist. Ct.).
108. *Protection de la Jeunesse* — 267 (2 December 1987), (Que. T.J.), [unreported].
109. See *Re McTavish and Director, Child Welfare Act* (1986), 32 D.L.R. (4th) 394 (Alta. Q.B.) [hereinafter *Re McTavish*]; *Re L.D.K.* (1985), 48 R.F.L. (2d) 164 (Ont. Prov. Ct. Fam. Div.).
110. *Re McTavish*, *ibid.* Note: This reported decision joins three proceedings arising from one circumstance involving the same child. These are treated separately for purposes of the database and the case count.
111. S.A. 1984, c. C-8.1.

112. *Supra*, note 109.
113. *Gareau v. Superintendent of Family and Child Services of B.C.* (1986), 2 B.C.L.R. (2d) 268 (S.C.); 5 B.C.L.R. (2d) 352 (S.C.).
114. *Re J. and C.* (1985), 48 R.F.L. (2d) 371 (Ont. Prov. Ct. Fam. Div.).
115. *Ross v. Registrar of the Supreme Court (Family Division)* (1986), 26 D.L.R. (4th) 154 (P.E.I.S.C.).
116. *Coulombe v. Commission d'appel en matière de lésions professionnelles* (1987), [1987] 8 R.J.Q. 1822 (Que. S.C.).
117. *Crupi v. Canada Employment and Immigration Commission* (1986), [1986] 3 F.C. 3 (F.C.A.).
118. (1987), [1987] 5 W.W.R. 739 (B.C.S.C.).
119. *Gosselin c. A.G. Quebec* (11 December 1986), (Que. C.S.), [unreported].
120. (1986), 55 O.R. (2d) 596 (Ont. H.C.), *aff'd* (1986), 57 O.R. (2d) 409 (C.A.).
121. R.S.C. 1970, c. W-5.
122. (1985), 24 D.L.R. (4th) 718 (B.C.C.A.).
123. R.S.B.C. 1979, c. 103.
124. (1985), [1985] 6 W.W.R. 690 (Y.T.S.C.).
125. 1977 (2nd. Sess.) (Y.T.), c. 3 (also R.S.Y.T., c. E-1.2).
126. *Reference Re Yukon Election Residency Requirement* (1986), 27 D.L.R. (4th) 146 (Y.T.C.A.).
127. (1987), 6 A.C.W.S. (3d) 37 (Sask. Q.B.).
128. R.S.S. 1978, c. U-11.
129. (1985), 20 D.L.R. (4th) 609 (B.C.S.C.).
130. *Greater Quebec School Board v. A.G. Quebec* (2 December 1985), (Que. S.C.), [unreported].
131. R.S.C. 1970, c. C-34.
132. See *R. v. Paré* (1986), 31 C.C.C. (3d) 260 (B.C.S.C.); *Ringuette v. A.G. Canada* (1986), 58 Nfld. & P.E.I.R. 163 (Nfld. S.C.); *aff'd* (1987), 63 Nfld. & P.E.I.R. 126 (Nfld. C.A.).

133. See *R. v. Tremblay* (1985), 20 C.C.C. (3d) 454 (Sask. Q.B.); *Reference Re French Language Rights of Accused in Saskatchewan Criminal Proceedings* (1987), [1987] 5 W.W.R. 577 (Sask. C.A.) [hereinafter *French Language Rights Reference*]; *Paquette v. Canada* (1985), [1985] 6 W.W.R. 594 (Alta. Q.B.); *R. v. Paquette* (No. 2) (1986), 69 A.R. 87 (Alta. Q.B.), rev'd (1987), [1988] 2 W.W.R. 44 (Alta. C.A.).
134. *French Language Rights Reference*, *ibid.*
135. *McDonnell v. Fédération des Franco-Colombiens* (1985), 69 B.C.L.R. 87 (B.C. Co. Ct.) aff'd (1986), [1986] 6 W.W.R. 704 (B.C.C.A.).
136. *Cormier v. Fournier* (1986), 69 N.B.R. (2d) 155 (N.B.Q.B.).
137. See *Mahe v. Alberta* (1985), 22 D.L.R. (4th) 24 (Alta. Q.B.), aff'd (1987), [1987] 6 W.W.R. 331 (Alta. C.A.); and *Marchand v. Simcoe County Board of Education* (1986), 55 O.R. (2d) 638 (Ont. H.C.).
138. R.S.A. 1980, c. S-3.
139. *Supra*, note 137.
140. (1986), 53 O.R. (2d) 513 (Ont. C.A.), aff'd (1987), [1987] 1 S.C.R. 1148.
141. The preamble to Bill 30 stated that it had been public policy in Ontario since 1899 to provide public funds to support education in the Roman Catholic separate schools to the end of Grade 10.
142. (1986), 55 O.R. (2d) 749 (Ont. Div. Ct.), rev'd (1988) 29 O.A.C. 23 (C.A.).
143. The figure of seven cases initiated by women differs from the figure of nine women's cases given in Chapter Three because two criminal cases, *R. v. Morgentaler* (1988), [1988] 1 S.C.R. 30 and *R. v. Wallace* (1987), 2 W.C.B. (2d) 73 (Ont. Dist. Ct.) are excluded.
144. Here we mean:
 - women when they are affected by sex inequality;
 - women and men of Aboriginal ancestry;
 - women and men who are members of national or ethnic or racial minorities; and
 - women and men with disabilities or who have been so labelled.

ACCESS TO THE COURTS

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Introduction

As we have shown in the previous two chapters, women in Canada do not have adequate access to the use of Charter rights. Women are initiating few cases themselves, while men are initiating significant challenges that affect women's rights. If the Charter is to be a positive instrument for advancing equality, women need to be able to initiate major cases themselves and to intervene effectively when their rights are at stake. What determines the extent of women's access to the courts?

This chapter discusses standing to sue, intervenor status, and funding for litigation. The first two are legal issues. When a court deals with standing and intervenor status, it determines who will be recognized as a proper participant in a case. Despite uncertainty about the courts' approach and some important unresolved issues, recent decisions hold out hope that women and other disadvantaged groups may not be barred from participation by narrow rulings. However, even if disadvantaged groups are assisted by a generous approach to standing, their access will be severely restricted if adequate money and resources are not available to support Charter equality rights litigation.

Questions of access are crucial because they determine who can make their voices heard in the courts and who can participate in shaping the interpretations of the new equality guarantees.

Relaxed Rules of Standing

There has been a recent relaxation of the rules governing standing, or who the courts will recognize as a party. Traditionally, no person, except an Attorney General, could bring a constitutional challenge unless they were directly affected by the impugned law in a more significant way than were other citizens.¹ But in the past decade, courts have shown increasing flexibility about that requirement.² The decision of the Supreme Court of Canada in the case of *Borowski*³ radically altered the law of standing.

Joseph Borowski was granted standing to challenge section 251 of the *Criminal Code*, a law that was totally inapplicable to him, on the basis of alleged violations of fetal rights under the *Canadian Bill of Rights*. The effect of the standing decision in *Borowski* is that a court challenge may be brought by a citizen who is not affected directly by legislation where there is "no other reasonable and effective manner in which the issue may be brought before the court."⁴

Another example of the relative ease with which constitutional challenges may be initiated arises in the context of criminal prosecutions. Anyone charged with a criminal offence is permitted to challenge the constitutional validity of the law under which she/he has been charged, even if the alleged infringement is not directly applicable to the accused.⁵ An implication for women of this broad rule of standing becomes apparent in the context of a sexual assault trial such as that of *R. v. W.D.C.G.*⁶ in which a male accused was permitted to argue that section 149(1) of the *Criminal Code* should be struck down because only a "female person" could be a victim of the crime. The accused was not himself suffering from any lack of

legislative protection, nor was he being penalized because of his sex. Section 149(1) said:

Everyone who indecently assaults a female person is guilty of an indictable offence and is liable to imprisonment for five years.

Although the New Brunswick Court of Appeal upheld the law on the basis that it did not penalize men but rather singled out a particular group for protection, the Court did not question the standing of the accused to raise the sex equality challenge, which had the potential to affect all women in Canada.

Further, the principle that a person may challenge legislation on behalf of other persons as part of his or her defence against a lawsuit is apparently not restricted to criminal prosecutions. For example, in *Shewchuk v. Ricard*⁷ where the issue was liability of a putative father for child maintenance under a provincial statute, Jerry Ricard, the putative father, was permitted to challenge the legislation on the grounds of underinclusiveness, even though he was not a member of the excluded class. Ricard argued that sections of the *Child Paternity and Support Act*⁸ should be struck down because a father who is left with an "abandoned" child in his arms (which Ricard was not) does not have the same remedies open to him to obtain support from the child's mother, as the mother does to obtain support from the child's father.

Third parties have been permitted to make fair trial challenges pursuant to section 11(d) of the Charter, in trials that are not even their own. For example, in the Ontario Court of Appeal, as a result of a sexual assault trial, Canadian Newspapers Co. (a publishing conglomerate) was able to invoke the Charter's fair trial guarantee to challenge a provision of the *Criminal Code* protecting persons who are sexually assaulted from having their names publicized against their will.⁹ Canadian Newspapers Co. was not a party in the sexual assault proceeding, and at no point was it suggested that the fair trial rights of the accused had been violated. Despite this, the Ontario Court of Appeal permitted Canadian Newspapers Co. to argue that fair trial rights had been violated.

As these cases indicate, relaxing the rules of standing has made challenging women's protections easier; it is not yet clear, however, whether it will also make it easier to represent women who are not in a position to initiate challenges on their own.

In some cases, parties directly affected by inequality are too isolated and too threatened to act on their own behalf. This may be the case, for example, with domestic workers, the majority of whom are women of colour, in Canada on temporary permits. Many of them are reluctant to challenge their poor working conditions and their lack of protection in Canadian labour law. Legitimately, they fear reprisals and deportation. Standing rules should be broad enough to allow another party, such as an advocacy organization, to initiate a challenge in circumstances like these.

Despite the recent relaxation of the rules of standing, however, it is still not clear that non-profit societies will be able to initiate section 15 challenges on women's behalf when there is no directly harmed woman willing or able to be the named plaintiff. Depending on the courts' approach to this issue, groups like INTERCEDE,¹⁰

or the Women's Legal Education and Action Fund (LEAF) may not be able to obtain standing, because section 15 says "every individual has the right to equality", and the courts seem to agree that "individual" does not include corporations.

Corporations do not have equality rights according to most of the courts that have ruled on this issue so far.¹¹ We believe this is the correct position for the courts to take, because constitutional equality guarantees are not needed to secure the rights of corporations. However, it will be important for the future of equality rights litigation that, when courts make decisions about standing under section 15, they distinguish between not-for-profit societies seeking to bring forward public interest issues on behalf of members of disadvantaged groups and for-profit corporations litigating in their own interests.¹²

Given the many ways cases affecting but not involving women can be initiated, women's ability to get before the courts themselves is crucial.

A Generous Approach to Public Interest Intervenor

Because there has been a general relaxation of the rules governing who can initiate a constitutional case, it is important to establish a similar relaxation of the rules governing who can intervene as well as a generous approach to public interest intervenors.

Inherent Jurisdiction

The power of the courts to hear representations from intervenors is based on their inherent jurisdiction to accept assistance from an *amicus curiae*, that is, a friend of the court. In addition to the powers vested in the courts by virtue of their inherent jurisdiction to allow interventions, most jurisdictions have statutory rules giving the courts wide discretion to grant or deny leave to prospective intervenors.¹³

Automatic Rights of Attorneys General

In contrast to the general principle that decisions concerning intervenor status are discretionary, rules governing many courts give provincial and federal Attorneys General automatic rights of notice and participation in constitutional cases.¹⁴ The imbalance between citizen and state representation permitted by the special rules for Attorneys General has not gone unnoticed. One academic commentator has said:

There is a certain irony to this in the context of Charter litigation, since the participation of Attorneys General, who will normally (though not always) be united in seeking to uphold the constitutional validity of the challenged legislation, tends to "stack the deck" in favour of government. If the primary purpose of the Charter is to give Canadians a vehicle for asserting rights **against** government, it seems strange that governments that were not initially parties to the litigation should be provided with an automatic vehicle for conveying their message to the courts, while those interested in presenting a non-governmental perspective must depend on the willingness of the courts to let their voices be heard.¹⁵ (emphasis in original)

The fact that Attorneys General have automatic rights of intervention is one consideration in favour of a generous approach to interventions by public interest intervenors in constitutional cases.

Public Participation in Charter Litigation

There may be some private law disputes, involving the routine application of established legal principles, that do not have much impact on anyone other than the parties to the dispute. However, this is never the case with Charter litigation. The superordinate status of the Charter means that every time a Charter challenge is brought, laws may be changed. In addition, the Charter is so new that the meaning of its provisions is being tested constantly. It has been argued by the Canadian Civil Liberties Association and others that it is contrary to democratic principles for courts to interpret and apply the Charter, which will affect the lives of all Canadians, without the benefit of representations from a variety of perspectives.¹⁶ These are additional reasons for the courts to take a liberal approach to public interest interventions in Charter cases.

The idea that public interest intervenors have a role to play in Charter cases involving important questions of interpretation was accepted by Justice Lamer in the case of *Mark Andrews*¹⁷ at the Supreme Court of Canada. As previously indicated, this case is the first equality rights case to be heard by the Supreme Court of Canada. Though Andrews, being white, British, and a male law graduate, is certainly not disadvantaged, his case has been identified as critical for those who are. Justice Lamer granted intervenor status to LEAF, the Coalition of Provincial Organizations of the Handicapped (COPOH), and the Canadian Association of University Teachers (CAUT), saying in his order:

... it is apparent that the Judgement of the Court of Appeal of British Columbia as it now stands is determinative of more issues than that of whether the restrictive bylaw of access to the legal profession to Canadian citizens only is in violation of Section 15 of the Charter. I am accordingly granting these motions to intervene ...¹⁸

■ The Rights of Intervenors

The rights of a public interest intervenor are usually thought to be less than that of a party. For example, an intervenor will not ordinarily be permitted to add to the evidence or expand the grounds of an appeal.¹⁹ Such restrictions may be appropriate for public interest intervenors in a case such as *Mark Andrews*,²⁰ where the concern of the intervenors was not with the resolution of the dispute but with the manner in which the Charter is interpreted. However, in a case such as *Schachter* — where the intervenor, LEAF, was advocating a particular resolution of the issues before the court and where women would be directly affected by the outcome of the case, possibly even to a greater extent than the parties themselves — it was appropriate that the intervenor be accorded party rights. In *Schachter*, LEAF was granted intervenor status with all the rights of a party.²¹

■ Interventions by Feminist Organizations are Needed

There is a further argument that gives a feminist organization with expertise in the area of equality a particularly strong claim to intervenor status in Charter cases. In view of the overwhelming number of male-initiated sex equality cases and the nature of the arguments being made both by their advocates and by counsel for the Attorneys General, it seems doubtful that many Canadian judges will ever be exposed to models of equality that could actually do something positive for women if women are not permitted to intervene in equality cases initiated by men.

The extent of the courts' willingness to hear from disadvantaged groups when they are not parties may well determine the direction of equality rights jurisprudence. There is no way to ensure that the courts will breathe real life into the Charter's equality guarantees. But if only those interpretations espoused by Attorneys General, defence lawyers, and professional groups are before them, the courts' view will be very limited. The equality guarantees cannot be given the full meaning and impact required by a purposive approach unless the courts listen to the voices of those who are disadvantaged.

■ Trends Concerning the Granting of Intervenor Status

Traditionally, a prospective intervenor had to demonstrate a direct legal interest, such as a proprietary interest, in the subject matter of the dispute. Even in the mid-1980s,²² it was apparently quite difficult to obtain intervenor status in the Supreme Court of Canada. But the recent trend in Canada seems to be away from a restrictive approach. It is evident from at least one case that the Charter itself has encouraged courts to re-evaluate their traditional view of intervenors. Justice Addy of the Federal Court of Appeal said:

The narrow view found in common law jurisprudence to the effect that only parties with a triable interest in the actual issues raised in the pleadings have a right to be heard, was developed and established long before administrative law as we know it today really came into being and thus became subject to judicial control and intervention to any extent. A completely different situation now exists especially in Canada where the supervisory role granted to our Courts has been largely extended by reason of the Charter of Rights, as well as by the proliferation of boards and commissions.²³

In 1987, LEAF was granted intervenor status by the Supreme Court of Canada, courts of appeal, and the Federal Court.^{24,25}

However, women have not been successful in obtaining intervenor status in all jurisdictions and at all court levels. On November 10, 1986, LEAF's application for intervenor status in the case of *Klachefsky v. Brown*²⁶ was rejected by Justice Huband of the Manitoba Court of Appeal, with costs against LEAF.

The background of the case argued strongly for court assistance from a feminist intervenor. In the court below, a child custody order had been varied in favour of a father because he had a new wife who would be available to the children 24 hours a day whereas their mother, who was starting a new job, would have to rely on child-care services. LEAF sought leave to intervene, with the consent of the children's

mother, to argue that if women's equality is to be obtained, child-care services cannot be considered inferior to care at home in the absence of specific evidence that it is so. Concerning the intervenor application in the Court of Appeal, Justice Huband said:

Counsel for the wife is entirely capable of raising and ventilating any issue relative to the *Charter of Rights and Freedoms* should counsel consider that such an argument would advance the cause of her client.²⁷

There is a problem with Justice Huband's reasoning. It does not necessarily follow that arguments relevant to women as a group will be raised by an individual woman's lawyer, no matter how capable she/he might be. In particular, if a lawyer suspects that a court will be impatient or uncomfortable about hearing equality rights arguments, her/his sense of duty to her/his client will likely cause her/him to refrain from making such arguments because they would **not** "advance the cause of the client". Indeed, counsel for Ms. Brown did not make equality rights arguments before the Manitoba Court of Appeal, even though she had been agreeable to the arguments being added by an intervenor. Ultimately, the Manitoba Court of Appeal ruled in favour of Ms. Brown, saying that the trial judge had committed a palpable error by placing undue emphasis on the fact that Ms. Brown was going to require paid child-care services.²⁸

*Roininen*²⁹ is another case in which an intervenor application by a feminist organization was refused. The central question in that case was whether the child apprehension powers of the Superintendent of Child Welfare permitted the apprehension of a fetus *in utero*. The British Columbia Superintendent of Child Welfare had used these powers while Sandy Roininen was in labour in order to force her to undergo a caesarian section. The authorities had set out to test the scope of their legislative power when they apprehended her fetus *in utero*. With the consent of Sandy Roininen, LEAF sought leave to intervene in the subsequent legal proceedings to present relevant Charter issues to the Court. The application of the prospective intervenor before Judge Davis of the British Columbia Provincial Court was denied, on the basis that a provincial court lacks jurisdiction to permit an intervention and, further, that LEAF did not fall within a class of "other persons the court considers appropriate"³⁰ to participate in a child apprehension hearing.

Judge Davis then proceeded to uphold the initial apprehension order without any discussion about women's rights to refuse medical treatment, arguing that it was simply a case of what was best for the safety and well-being of a child, not a case of women's rights. Need we say more about why the Court required the assistance of an intervenor? The judge's inability to see that state-ordered cutting into women's bodies raises issues of women's rights calls to mind words of Justice Wilson concerning men's perspective on abortion:

It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the

subjective elements of the female psyche which are at the heart of the dilemma.³¹

Having said that the courts should take a generous approach to would-be intervenors, it must be acknowledged that the courts' discretion to permit non-party participation in court cases is open to manipulation by those with nothing different to present to the court but who merely wish to reinforce the position of one of the parties. If such an agenda is made apparent to the court, intervenor status will be denied. In *Borowski*,³² Justice Matheson of the Saskatchewan Court of Queen's Bench denied Campaign Life Canada (CLC) permission to intervene because

... it was quite apparent that CLC intended, if granted permission to intervene, to substantially support the position advocated by the plaintiff.³³

If the agenda of a prospective intervenor is disguised, however, it may be possible to obtain intervenor status, notwithstanding a duplicative position. Five years after Campaign Life's application for intervenor status in *Borowski* was refused in the Saskatchewan Court of Queen's Bench, R.E.A.L. Women of Canada (an anti-feminist organization) obtained intervenor status in the *Borowski* appeal at the Supreme Court of Canada. The public position of R.E.A.L. Women on abortion does not differ in any appreciable way from that espoused by Borowski in the case. The group's position is that the "human rights of the unborn" take precedence over women's freedom of choice. This is also Borowski's position. Of course the final test of R.E.A.L. Women's legitimacy as an intervenor in the *Borowski* case will be whether the group adds anything that is useful to the Court.

Ironically, in documents supporting its application for intervenor status in this case, R.E.A.L. Women espoused equality for women, even though the organization opposes the introduction of many of the laws and programs requisite to that equality.³⁴ This should not be surprising. Equality is a term of our Constitution. This means that fighting it openly is difficult, whereas manipulating its meaning may be possible. As the equality rights movement in Canada gains momentum, instances of its detractors using the language of equality rights to justify the continued oppression of disadvantaged groups will no doubt become increasingly common. Already affirmative action programs are criticized as being a kind of reverse discrimination, and those opposed to legal protections for lesbians and gay men complain that human rights laws interfere with their liberty and their freedom of religion. It is to be hoped the courts will look with a critical eye upon the submissions of any intervenor, or indeed of any party, who uses the language of equality to advocate limits on women's freedoms and access to resources.

Access: The Practical Questions

Can women and other disadvantaged groups really use the equality rights guaranteed in the Charter, or do they, in practice, remain beyond their reach?

The figures given in Chapters Three and Five, documenting women's participation in equality rights litigation in the first three years, demonstrate dramatically the seriousness of the access problem. Women simply do not have the money,

resources, and power necessary to use the law that is there to protect and support them.

Developing the cases to challenge the many inequalities experienced by women and others is a major task. The cases are difficult and complex. It is rarely simple discrimination on the face of legislation that women need to challenge, but rather laws and policies that have an adverse impact, despite their apparent neutrality. Interventions are equally complex because they often concern difficult and important interpretive issues. Because the Charter guarantees are so new, every equality case is a crucial one, and it is important to describe the scope and nature of each sex equality issue as fully as possible for the courts. As we have said earlier, Canadian courts are not familiar with equality issues. This means that every equality-seeker who litigates now must also be an educator. To do this work well requires extensive research, knowledgeable counsel, access to experts, and informed litigants.

This case development is expensive and time-consuming, requiring a special expertise that few activists or lawyers in Canada have acquired thus far.³⁵ Few women in Canada who act alone have the money or the resources to engage in Charter litigation.

The irony of this situation is that those with the greatest need for the equality guarantees have the least access to them. As described in earlier chapters, corporations and men have better access to the use of equality guarantees than women and other disadvantaged groups.

Public funding is essential if women are to have any meaningful access to the exercise of their Charter rights. A constitutional guarantee of equality is a hollow promise if only the wealthy and advantaged can use it.

The federal government has taken one step to increase access for equality-seekers. In 1985, it established the Court Challenges Program, which is administered by the Canadian Council on Social Development. Litigants with equality cases challenging a federal law or program can apply to the Court Challenges Program for financial support. The program can supply up to \$35,000 per court level for lawyers' fees, case research, and disbursements.

Unfortunately, this public funding scheme has some severe shortcomings:

- Funding is available only for challenges to federal laws and policies.

No money is available to support challenges to provincial laws or policies through this program, and no provincial governments have made similar funds available, with one limited exception.³⁶ Health, education, the terms and conditions of employment, and social services are provincial matters because of the constitutional division of powers between the federal and provincial governments. These are crucial issues for women, but no funding is available to support challenges in these areas.^{37,38}

- \$35,000 per court level for all expenses is not enough to cover the development of complex cases.

Lawyers' fees are high, and extensive work is required to develop cases properly.³⁹ Sophisticated statistical and demographic evidence is needed in some cases. Historical, sociological, and economic studies are needed in others.

In addition, cases for women and other disadvantaged groups cannot be seen as simply individual. Every case will affect other women and perhaps other groups. This means that the preparation of any equality case has an importance beyond its particular facts and beyond the situation of the particular litigant. In these circumstances, the capacity to do thorough and wide-ranging research and to involve those with specialized knowledge and first-hand experience about particular equality issues is essential. The \$35,000 ceiling is an improper limit for disadvantaged litigants.

- Funding is available only for lawyers' fees and case-related research.

If the Charter's equality rights are to be used by disadvantaged groups in anything more than a purely haphazard fashion, resources and money are required to allow the development of expertise and litigation capacity. As already stated, equality cases are, by their very nature, not individual in scope. Well-developed cases require knowledge of the patterns of inequality for the whole group, where a particular case fits into this pattern, and what arguments will best serve the equality interests of the group as a whole.

While knowledge of the key issues for each group and the patterns of inequality from which it suffers exists in advocacy organizations for disadvantaged groups, the expertise to turn that information into legal arguments and developed cases does not.

After studying the experience of women in the United States,⁴⁰ women in Canada decided that meaningful access to the use of the new equality guarantees would require founding an organization dedicated specifically to the task of developing strategic equality rights litigation for women. In April 1985, women founded the Women's Legal Education and Action Fund (LEAF), an organization designed to assist women to exercise their new equality rights. As references throughout this report indicate, LEAF has been significantly involved in the Charter sex equality litigation to date.⁴¹

Recently, organizations representing disabled persons have taken the same decision and founded the Canadian Disability Rights Council.⁴² EGALE (Equality for Gays and Lesbians Everywhere) is also developing a litigation capacity, and groups representing racial and ethnic minorities, prisoners, and people with low incomes are considering how they can support effective litigation on behalf of their members.

For groups that have experienced longstanding disadvantage and powerlessness, meaningful access to the use of the equality guarantees requires more than money for lawyers' fees. It requires money to develop awareness, information, and expertise in their communities and to arrange consultation between groups. Without this vital education, research, and consultation, there is likely to be little equality rights litigation that truly represents the interests of women and other disadvantaged

groups. As long as governments do not recognize this, any funding schemes they design will continue to perpetuate the inequity between the advantaged and the disadvantaged in terms of their access to the courts.

- The Court Challenges Program is a five-year program; its mandate runs out in March 1990.

Those who apply for funds to the Court Challenges Program are being informed now that the program cannot pay for any litigation expenses after March 1990. Because litigation is often lengthy, litigants cannot be certain that actions they begin now will be completed by that time. In effect, women and other disadvantaged groups are being advised that they cannot rely any longer on the Court Challenges Program, even for support for cases within its mandate.⁴³

Conclusion

Thus, with all these difficulties, women and other disadvantaged groups struggle to gain access to the law, while institutions, including governments, universities, and hospitals, spend public dollars without restriction to oppose them.

The issue of access is the most basic one, and the state of access is, at present, shocking. There is only one source of funds to support equality rights litigation, and its mandate is too narrow, its funding levels too restricted, its design too unimaginative, and its future too uncertain to provide real access to the exercise of equality rights in Canada. It is to women's credit and to the credit of other disadvantaged Canadians that with so few resources and from such an unequal position, they are still struggling to make their voices heard in the courts.

The following chapter discusses the inadequacy of the theory of formal equality as an interpretive foundation for the Charter's equality guarantees. But the practical issue of access to the courts makes evident the failure of what formal equality offers. Currently, the law allows the advantaged and the disadvantaged alike to pursue their equality claims in court. Nothing in the law bars the disadvantaged: formal equality exists. However, the practical barriers are all too real. Women's disadvantage, their lack of money, resources, and power mean that they do not have equal access to the use of the very guarantees that are designed to advance their equality.

Endnotes

1. *Saumur v. A.G. Quebec* (1964), [1964] S.C.R. 252.
2. See *Thorson v. A.G. Canada* (1974), [1975] 1 S.C.R. 138; *N.S. Board of Censors v. McNeil* (1975), [1976] 2 S.C.R. 265; *Minister of Justice (Canada) v. Borowski* (1981), [1981] 2 S.C.R. 575.
3. *Ibid.*
4. *Ibid.* at 598.
5. *R. v. Big M Drug Mart Ltd.* (1985), [1985] 1 S.C.R. 295.
6. (1987), 81 N.B.R. (2d) 86 (C.A.).
7. (1986), [1986] 4 W.W.R. 289 (B.C.C.A.) [hereinafter *Shewchuk*].
8. R.S.B.C. 1979, c. 49.
9. *Canadian Newspapers Co. v. A.G. Canada* (1985), 16 D.L.R. (4th) 642 (Ont. C.A.), aff'd (1988), [1988] 2 S.C.R. 122 [hereinafter *Canadian Newspapers*]. The Supreme Court of Canada ruled that fair trial issues were not properly before the Court.
10. INTERCEDE is an Ontario non-profit organization dedicated to assisting domestic workers.
11. See *Aerlinte Eireann Teoranta v. Canada* (1987), 9 F.T.R. 29 (F.T.D.); *Re Aluminum Co. of Canada and the Queen* (1986), 29 D.L.R. (4th) 583 (Ont. H.C.); *Gerald Shapiro Holdings Inc. v. Nathan Tessis & Associates Inc.* (1986), 13 C.P.C. (2d) 288 (Ont. S.C.); *Homemade Winecrafts (Canada) Ltd. v. A.G. British Columbia* (1986), 26 D.L.R. (4th) 468 (S.C.); *K Mart Canada Ltd. v. Millmink Developments Ltd.* (1986), 56 O.R. (2d) 422 (Ont. H.C.); *Kurotak v. Minister of Highways and Transportation (Sask.)* (1986), [1986] 4 W.W.R. 323 (Sask. Q.B.); *L'Association des Détaillants en Alimentation v. La Ferme Carnaval Inc.* (1986), [1986] R.J.Q. 2513 (Que. S.C.); *B.C. Milk Board v. Clearview Dairy Farm Inc.* (1987), [1987] 4 W.W.R. 279 (B.C.C.A.); *Mund v. Medicine Hat* (1985), 67 A.R. 11 (Q.B.); *Nissho Corporation v. Bank of British Columbia* (1987), 39 D.L.R. (4th) 453 (Alta. Q.B.); *Smith, Kline & French Laboratories Ltd. v. A.G. Canada* (1986), [1986] 1 F.C. 274 (T.D.); *Surrey Credit Union v. Mendonca* (1985), 67 B.C.L.R. 310 (S.C.).
12. Even though corporations are likely to be denied standing to initiate cases challenging alleged violations of their equality rights, they will apparently be allowed to use s. 15 freely when defending themselves from a charge or where they can argue that legislation impinges on the rights of others. In *R. v. Big M Drug Mart Ltd.*, *supra*, note 5, the Supreme Court of Canada ruled that any accused, whether corporate or individual, can defend a charge by arguing that the law under which the charge is brought is unconstitutional. In other decisions following this ruling, corporations have been allowed to challenge Sunday closing laws on the grounds that they have a discriminatory effect on certain religious groups.

13. See, for example, Rule 8, Rules of Court (P.E.I.); Rule 8, Civil Procedure Rules (N.S.); Rule 15, Rules of Court (N.B.); Rule 13, Rules of Civil Procedure (Ont.); Quebec Code of Civil Procedure, Articles 208-215; Rule 75, Queen's Bench Rules (Sask.).
14. See *British Columbia Constitutional Question Act*, R.S.B.C. 1979, c. 63, s. 8, as amended by the *Constitutional Question Amendment Act*, 1982, S.B.C. 1982, C. 5; *Alberta Judicature Act*, R.S.A. 1980, c. J-1, s. 25; *Saskatchewan Constitutional Questions Act*, R.S.S. 1978, c. C-29, s. 8; *Manitoba Court of Queen's Bench Act*, R.S.M. 1970, c. C-280, s. 73; *Ontario Judicature Act*, R.S.O. 1980, c. 223, s. 35; *New Brunswick Judicature Act*, R.S.N.B. 1973, c. J-2, s. 23, as amended by *An Act to Amend the Judicature Act*, S.N.B. 1980, c. 28, s. 5; Rules of the Supreme Court of Canada, Rule 32.
15. P.L. Bryden, "Public Interest Intervention in the Courts" (1987) 66 *Can. Bar Rev.* 490 at 511.
16. See *ibid.* and the Canadian Civil Liberties Association's submissions to the Supreme Court of Canada, "Interventions in Public Interest Litigation", 17 July 1984.
17. *Andrews v. Law Society of British Columbia* (2 February 1989), File No. 19955/19956 (S.C.C.); (1986), [1986] 4 W.W.R. 242 (C.A.) [hereinafter *Mark Andrews*]. Leave to appeal granted by the Supreme Court of Canada: (1986), [1987] 74 N.R. 2.
18. *Mark Andrews, ibid.* in an Interlocutory Motion in the Supreme Court of Canada proceedings, 27 May 1987, File No. 19955/19956 at 2.
19. For example, in *Canadian Newspapers, supra*, note 9, the Supreme Court of Canada in its order granting intervenor status to LEAF, stipulated that "intervenants are to confine themselves to the issues raised by the parties and are not to add to the record." As well, in *R. v. Morgentaler* (1985), 19 C.C.C. (3d) 573 at 576, at the Ontario Court of Appeal, "right to life" groups were denied intervenor status because they were attempting to intervene to raise an additional ground of appeal.
20. *Supra*, note 17.
21. *Schachter v. Canada Employment and Immigration Commission* (1988), 18 F.T.R. 199 (F.C.T.D.). Also in *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education* (1986), [1986] 1 S.C.R. 549, leave to appeal was granted to a non-party.
22. See K.P. Swan, "Intervention and Amicus Curiae Status in Charter Litigation" in R.J. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987) at 27.
23. *Fishing Vessel Owners' Association of British Columbia v. A.G. Canada* (1985), 1 C.P.C. (2d) 312 at 319.
24. LEAF intervention applications were granted by the Supreme Court of Canada in *Mark Andrews, supra*, note 17; *Brooks v. Canada Safeway* (12 June 1987), File No. 20131; *Janzen v. Platy Enterprises* (30 July 1987), File No. 20241; and *Borowski v. A.G. Canada* (7 October 1987), File No. 20411. LEAF has intervened before Courts of Appeal in *Shewchuk, supra*, note 7; *R. v. Seaboyer* (1986), 50 C.R. (3d) 395 (Ont. C.A.).

25. The Canadian Disability Rights Council has been granted leave to intervene by the Supreme Court of Canada in the case of *R. v. Swain* (1987), 53 O.R. (2d) 609 which will be the first case in which s. 15 disability rights are interpreted. However, the Council was denied intervenor status in the Supreme Court of Canada in *McKinney v. University of Guelph* (1987), 63 O.R. (2d) 1 (C.A.) [hereinafter *McKinney*] where it wished to make important arguments concerning the scope of the Charter's application and the impact of interpretations regarding scope on disadvantaged groups.
26. (1988), 51 Man. R. (2d) 33 (C.A.) rev'g (1987), 51 Man. R. (2d) 40 (Q.B.). Leave to appeal to S.C.C. denied 22 February 1988.
27. *Ibid.* at 5.
28. *Ibid.* at 35.
29. *Re Baby "R"*, application for intervention dismissed (29 June 1987), File No. 87-6215 (B.C. Prov. Ct.). Application for intervention allowed (12 January 1988), File No. A872582 (B.C.S.C.).
30. *Family and Child Services Act*, S.B.C. 1980, c. 11, s. 12.
31. *R. v. Morgentaler* (1988), [1988] 1 S.C.R. 30 at 171.
32. (1983), 144 D.L.R. (3d) 657 (Sask. Q.B.).
33. *Ibid.* at 668.
34. In an affidavit of Gwen Landolt, Vice-President of R.E.A.L. Women sworn May 5, 1988 it is stated that:

The objects of R.E.A.L. Women of Canada is [sic] to promote the equality of women and to provide them with equal opportunity in education, employment and retirement as well as to integrate family life into government policies and legislation.

To anyone familiar with R.E.A.L. Women's literature it appears contradictory that the organization claims the promotion of women's equality as one of its objects. R.E.A.L. Women is well known as an opponent of women's equality, actively opposing universal child care, equal pay for work of equal value, affirmative action, and freedom of choice on abortion. The statement of "objects" in Landolt's affidavit does not accord with the objects contained in the organization's corporate records, which are:

- to reaffirm that the family is society's most important unit, since the nurturing of its members is best accomplished in the family setting;
- to promote, secure and defend legislation which upholds the Judeo-Christian view of traditional marriage and family;
- to recognize the woman's role as educator and nurturer of the family in the home, and to recognize the woman's unique contribution to society through her volunteer work in the community;
- to support policies for women whose primary concern is the care and well-being of her family, whatever her circumstances;
- to support policies for women that provide them with equal opportunity in education, employment and retirement;

- to support the right to life of all innocent individuals from conception to death.

35. Equality rights and human rights litigation is not a major legal specialty in Canada. Most lawyers practise criminal, family, or corporate law. Only a few have an already developed expertise in this area.
36. Ontario is the exception here, but it is a very limited exception. It has provided financial support for women's equality litigation by giving the Women's Legal Education and Action Fund (LEAF) access to a million-dollar fund. However, no other women's organization and no other group has access to public money in Ontario for equality challenges.
37. The exception is stated in note 36, *supra*.
38. Ironically, the Court Challenges Program provides funding for minority language challenges whether they arise in federal or provincial jurisdiction. Apparently bilingualism is a national policy that the federal government considers it should protect, but equality is not.
39. Costs for a major Charter case carried from trial to appeal levels can be much higher than this. In the case of *Wilson v. Medical Services Commission of British Columbia* (1988), 30 B.C.L.R. (2d) 1 (C.A.), rev'g (1987), [1987] 3 W.W.R. 48 (S.C.), Brian Wallace, Q.C., counsel for the group of petitioners — Arnason, Conway, Williams, and Kwan — estimates that fees and disbursements for this group may be between \$250,000 and \$300,000. Included in this figure is the cost of the trial, the appeal, and two contested applications, one for a stay of execution and one for leave to appeal to the Supreme Court of Canada. This is an ordinary set of proceedings for a constitutional case. Steven Barrett, a lawyer with Sack, Charney, Goldblatt and Mitchell, a firm that has acted for parties in *McKinney*, *supra*, note 25, and *Re Lavigne and Ontario Public Service Employees Union* (1986), 29 D.L.R. (4th) 321 (Ont. H.C.), confirms that costs of this magnitude are not unusual for constitutional equality rights litigation.
40. See M.E. Atcheson et al., *Women and Legal Action: Precedents, Resources and Strategies for the Future* (Ottawa: Canadian Advisory Council on the Status of Women, 1984).
41. Chapters Three and Four provide descriptions of LEAF's involvement in a number of women's sex equality cases.
42. The decision to found a new organization was made when disability organizations and leaders realized that equality challenges were not being initiated by disabled Canadians and were not likely to be in the absence of an organization designed to provide the special expertise required. Without the Council, it seemed clear that Canadians with disabilities would not benefit from the world's first constitutional equality guarantees for disabled persons, which they had lobbied so hard to obtain.
43. The Canadian Advisory Council on the Status of Women (CACSOW) has passed a set of recommendations endorsing the continuation of the mandate of the Court Challenges Program. See: CACSOW, *Recommendations* (Ottawa), Court Challenges Program recommendation, March 1989, listed under Canadian Charter of Rights and Freedoms (D1.11).

FORMAL EQUALITY
AND THE
SIMILARLY SITUATE AND
REASONABLENESS TESTS

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Introduction

Over the past three years, Canadian courts have developed two analytical tools for interpreting section 15 of the Charter. These tools are the similarly situate test and the reasonableness test. The first is a method for applying formal equality theory. The second reintroduces a *Canadian Bill of Rights* test for government irrationality.

These tests have become influential.¹ Not all courts have used them, and there are certainly differences in reasoning from court to court and from case to case. But when the body of section 15 decisions is considered as a whole, the differences in analysis are much less striking than the similarities. There is a clearly detectable pattern in the decision-making. Unfortunately it is not one that holds promise for women and other disadvantaged groups.

The Ontario Court of Appeal has set out the rationale for the similarly situate test, and the steps for applying it, in a line of cases that are often referred to now by other courts. The B.C. Court of Appeal has developed the reasonableness test, fleshing out its view that only "unreasonable" inequality violates the section 15 guarantee.

While some decisions attempt to distinguish between the Ontario and B.C. approaches, in recent decisions of the Ontario Court of Appeal, the similarly situate test and the reasonableness test appear to have become steps in one comprehensive model for interpreting section 15.² Other courts have adopted these two approaches, using them alone or together depending on the circumstances of the case.³

This chapter expands on earlier discussions of the theory of formal equality, which is the foundation for both tests. It then describes in detail the complexities and problems of the tests which have been developed principally in the context of cases that do not deal with disadvantaged groups. We examine many cases to illustrate how the tests, particularly the similarly situate test, work in practice. Finally, the chapter provides an assessment of the capacity of the two interpretive tests to deliver meaningful equality for women and other disadvantaged groups.

The Theory of Formal Equality

The idea of equality underlying *Canadian Bill of Rights* jurisprudence, and the idea of equality most familiar to Canadian judges, is that of formal equality. Formal equality means equality in the form of the law, and it requires that laws treat similarly persons who are similarly situated. In current legal literature, formal equality is distinguished from substantive equality, which means equality in the substance of one's condition.⁴

Formal equality and the idea of the rule of law are closely linked. If everyone should be equally subject to the law, as the rule of law requires, then the law should also treat all alike persons alike. When French and U.S. revolutionaries proclaimed that "all men are born equal" and are "free and equal in respect of rights", they were endorsing the ideas inherent in the rule of law.

Formal equality was first defined by Aristotle who said in his *Ethics*, "equality consists of treating equals equally and unequals unequally."⁵ Belief in the idea of formal equality has co-existed, however, with the exclusion and oppression of women and other disadvantaged groups from the time of its first expression until the present day. Aristotle's Greece was a slave-holding society in which women were not citizens; in Canada, it was not until well into this century that women and members of racial minorities were enfranchised.

The idea of formal equality has taken women and other disadvantaged groups into its embrace only very recently. Now, having been accepted as "likes" for purposes of some basic rights, women and other disadvantaged groups find that the concept of formal equality is inadequate to the task of erasing the effects of centuries of discrimination.

In formal equality theory, it is assumed that equality is achieved if the law treats likes alike. An absence of different treatment of men and women in the form of the law (gender neutrality), together with neutral application of the law, are thought to make men and women equal.

Certainly, there are times when like treatment is exactly what women want. The fights for the vote and for admission to professions were fights for formal equality. More recently, challenges to laws pertaining to vital statistics and change of name acts were undertaken to obtain for women the same right as men to name themselves and their children.⁶

In circumstances where women and men are identically situated with respect to the opportunity or right sought, the model of formal equality works. However, when women and men are not identically situated, which is most of the time, the formal equality model breaks down; in fact, it is inherently discriminatory.

There are two problems for women at the heart of formal equality:

- there is an insistence on narrow comparability; and
- disadvantage is made invisible.

Comparability

According to formal equality theory, equality is a question of sameness and difference.⁷ To qualify for equality, one must be like someone who already has it. When male standards are presumed to be the norm, two further problems are created for women:

- the standard for entitlement to equality can be impossible to meet; and
- women's inequality problems that have no male analogue cannot be addressed.

The majority of Canada's equal pay laws, which still require only that men and women be paid the same for the same work,⁸ illustrate that a male standard is assumed when formal equality is applied. According to these laws, women can receive the same pay as men when they perform the same work; if they do not perform the

same work, their consistently lower "women's pay" is understood not to be an equality problem.

Of course, men and women for the most part do not do the same work. Most Canadian women work in a virtually separate sphere from men, in low-status female enclaves. For obvious reasons, then, laws requiring women to do the same work as men in order to get equality in pay have had no significant impact on the longstanding wage gap. Nor do these laws come to grips with the fact that men's pay is higher because they are men and women's pay is lower because they are women. While these laws purport to embody a neutral standard, they require women to be the same as men in order to get equality: the basic sex bias in pay systems is ignored.

The privilege of men is so thoroughly ingrained in our society that it is invisible, particularly to those who enjoy it.⁹ In fact, our society is a very well designed, finely tuned affirmative action program for white, temporarily able-bodied men. The standards for access to opportunities are male standards, and formal equality theory, rather than providing a means of breaking barriers for women, perpetuates them by requiring that women be like men in order to obtain equality. The standard of equality is set by the advantaged group. To the extent that women are not like men, they simply cannot achieve equality through the application of formal equality.

Also, formal equality cannot address the inequalities women experience that have no analogue for men. Laws or programs that deal with women's capacity to be pregnant and give birth, rather than being recognized as necessary to meet the real needs of women and to allow them to operate on a footing of equality with men, are seen to be discriminatory because only women benefit. In addition, some of the most brutal aspects of women's oppression, such as rape, battery, prostitution, pornography, and control of reproduction, are deemed not to be equality issues, but rather "sex differences".¹⁰

As long as comparability is required, and as long as women must be like men to obtain equality, inequality will persist.

The Invisibility of Disadvantage

The theory of formal equality, directed as it is to like treatment and different treatment, assumes that equality is a question of sameness and difference in the form of the law, rather than a question of dominance and subordination between groups.¹¹ The extreme and persistent economic and social inequality of women, which is the result of society's bias and oppression, is obscured by a definition of equality that focusses only on differences in the form of the law. Women are poorer than men, they work in ill-paid female ghettos, they are the primary caregivers for their children and parents, and they are, overwhelmingly, the victims of rape and battery.¹² Simple gender neutrality in law based on male standards does not address these major inequalities. In fact, gender neutrality in laws perpetuates women's inequalities. Because most laws are now gender-neutral, the illusion is created that no inequality exists. Thus formal equality makes disadvantage invisible.¹³

Formal equality is inadequate to the task of creating real equality because it does not encompass or even acknowledge inequality of condition. Women's conditions are worse than men's; they are disadvantaged, exploited, degraded, and brutalized. A concept of equality that ignores the facts of women's inequality in order to focus on equality in the form of the law, and that purports to provide equality by treating the advantaged and the disadvantaged the same, can only be viewed as cruelly perverse. It is meaningless to those whose equality interests are most in need of protection and advancement.

For every disadvantaged group that is different in significant ways from white able-bodied males, formal equality also poses problems. For women affected by discrimination because of disability, it is inherently discriminatory. When standards based on the norms of the able-bodied are applied to disabled persons, any resulting inequality is attributed to the disability and therefore is not considered an equality problem. The reasoning of the Saskatchewan Court of Queen's Bench in the case of *Re Canadian Odeon Theatres and Saskatchewan Human Rights Commission* exemplified this.¹⁴ In this case, Michael Huck complained to the Saskatchewan Human Rights Commission when the Canadian Odeon Theatre in Regina required him to sit in front of the front row of seats, that being the only available space in the theatre for his wheelchair. Justice Halvorsen ruled that the theatre had offered Huck a ticket and a seat to watch the movie, which is all any patron receives. The Court reasoned that if he could not use them because he was reliant on a wheelchair, the problem was caused by his disability, not by the theatre.

Disabled women experience inequalities with no clear analogue among able-bodied males. For example, many disabled women have no control over who provides their intimate attendant care. They are required to live in designated places and to receive their care from designated attendants, in some circumstances even when those attendants have sexually assaulted and abused them.¹⁵ The right to choose who will provide attendant care, as well as where, when, and how it will be provided, are key issues in securing dignity, autonomy, and equality for disabled persons. If one applies formal equality theory, however, this is simply not an equality issue, because able-bodied males have no comparable experience.

Nor do Aboriginal peoples envision achieving equality by being treated the same as whites. They reject the values of the white culture that has oppressed them and continue to struggle for recognition of their own values and autonomy. Though for individual Aboriginal people living in white culture, receiving the same treatment as whites would be a significant advance over the overtly bigoted treatment to which they are subjected daily, formal equality can only advance them to the extent that they are like white men. Those who have white men's qualifications may advance in white men's institutions. Because formal equality theory permits only narrow comparability to the dominant group, its adherents can comfortably fail to see that providing meaningful equality for Aboriginal people in Canada requires measures which will both overcome the effects of historical discrimination and recognize the validity of separate cultures.

Despite its patent falsity, the idea of formal equality is nonetheless powerful and widely accepted. It creates a comfortable illusion of equality. Because of this, it

is used to perpetuate and justify the status quo of gross inequality for women and other disadvantaged groups. Asserting that equality means neutrality, that is, treating all groups the same, amounts to turning a blind eye to real inequality.¹⁶

The inadequacies of formal equality have been critically examined by a number of legal theorists¹⁷ and in the mass of feminist legal writing that is now accumulating. Furthermore, its weaknesses are freshly and concretely apparent in the body of Charter equality decisions handed down to date. It has been the principal theory applied by judges, and the cases reveal that in practice it is weak, artificial, circular, and disconnected from the problems of disadvantaged groups.

Let us examine the standard reasoning put forward by the courts in applying formal equality theory and the analytical tests that support it.

The Similarly Situate Test

In laying the groundwork for the similarly situate test, the courts indicate that the theoretical starting place for an equality rights inquiry is the rule of law,¹⁸ that is, the rule that everyone should be equally subject to the law. However, if everyone is equally subject to the law, two problems are immediately presented:

- inequality will be produced in cases where it is essential to consider the different situations people are in for one reason or another; and
- government power will be impossibly restricted if each and every classification made in the law is reviewable by a court.

Clearly, the courts reason, governments write laws that deal with different groups of people differently. For example, the law makes distinctions between military personnel and civilians, young persons and adults, and prisoners and free persons. Not every one of these classifications should trigger scrutiny by the courts.

The next step taken by the courts is therefore to reject the notion that equality requires universal application of the law. It is not necessary to treat everyone the same all the time. Justice McIntyre in *R. v. MacKay*,¹⁹ a 1980 *Canadian Bill of Rights* decision, is regularly quoted on this point.²⁰ He said:

It seems to me that it is incontestable that Parliament has the power to legislate in such a way as to affect one group or class in society as distinct from another without any necessary offence to the *Canadian Bill of Rights*. The problem arises however when we attempt to determine an acceptable basis for the definition of such a separate class, and the nature of the special legislation involved. Equality in this context must not be synonymous with mere universality of application. There are many differing circumstances and conditions affecting different groups which will dictate different treatment.²¹

Once it is established that not **all** differentiation between classes triggers judicial review, the question is: When is it triggered? The courts offer the similarly situate test to answer that question. The statement of the test most often referred to is in

an early Ontario case, *Re McDonald and R.*, in which Justice Morden of the Ontario Court of Appeal said:

It can reasonably be said, in broad terms, that the purpose of s. 15 is to require "that those who are similarly situated be treated similarly".²²

This thesis was restated by him in a later decision in the case of *R. v. R.L.*:

The basic nature of the right or rights conferred by s. 15 requires some examination. The essentially relational nature of equality has been described as follows. "The concept of equality is, by definition, relational or comparative. A person can only be found to be equal **in relation to** or **in comparison with** some other person who serves as a standard or criterion."²³

The similarly situate test has been approved and applied in subsequent decisions of the Ontario Court of Appeal,²⁴ as well as in many decisions of lower courts and other appeal courts.

In the more recent decisions (*R. v. Ertel*,²⁵ *R. v. Turpin*,²⁶ and *R. v. S. (Sheldon)*²⁷), the Court of Appeal has articulated the test in more detail. As summarized in *R. v. S. (Sheldon)*, the test for determining whether there has been a contravention of section 15 now has three steps:

- an identification of the class of individuals who are alleged to be treated differently;
- a consideration of whether the class purported to be treated differently from another class is similarly situated to that other class in relation to the purpose of the law; and
- a determination as to whether the difference in treatment is "discriminatory" in the sense of a pejorative or invidious or disadvantageous purpose or effect of the law or action impugned.²⁸

The first two steps set out the similarly situate test. The third step interprets the phrase in section 15 "without discrimination".

These steps may sound simple and straightforward: the court must identify the class it is dealing with and then determine whether it is similarly situated to another class that is treated differently. In fact, the steps are complex and, in practice, extremely confusing. There are no criteria for defining classes, determining membership, or comparing classes. As a result, the courts' decisions about the identity of classes and their comparability to each other are often obscure and based on tortured logic. It is not clear what an applicant must establish to be entitled to the same treatment. Must she show that she is a member of a class that is similarly situated to another class that is affected more beneficially by the impugned law or policy? Or, is it sufficient that she show that individually she is similarly situated to those in a particular class and therefore should receive the treatment they do? Alternatively, can she show that she is not similarly situated to those in a particular class and therefore should not be treated as if she were?²⁹

While it is not clear what an applicant must do to be successful, it is clear from the case law that there are many ways to lose. An applicant can lose because she is in a class, because she is not in a class, because the class she is in is not similarly situated to the comparison class, or because she is treated the same as others in her class and no comparison with another class is made.

We will now consider the problems associated with the first two steps as set out in *R. v. S. (Sheldon)*.

Identifying the Class

The way the court defines a class, or its willingness to recognize a class, can make the difference between winning and losing. The courts can justify making a comparison between classes, or refusing to make a comparison between classes, by the way they define the class or whether they recognize it at all.

■ Refusing to Recognize a Class

In some cases the court simply refuses to recognize the class identified by the applicant. This occurred in the case of *Beltz v. Law Society of British Columbia*³⁰ where the applicant asked the Court to recognize that he belonged to a different class that should be treated differently. Beltz objected to the standard fee of \$2,750 that every lawyer in British Columbia had to pay to the Law Society in 1986 in order to practise. He argued that, as a lawyer in criminal practice, he should not be required to pay the same errors and omissions insurance as lawyers in other types of practice, because criminal practice does not attract the full range of negligence claims that the insurance is designed to cover. The Court refused to recognize the class of lawyers in criminal practice, and Beltz lost his case. Justice MacDonald of the British Columbia Supreme Court found that, in the absence of legal specialization, there was no obligation on the law society to distinguish between classes of lawyers. He said, "How can a practice fee charged to every lawyer equally be discriminatory?"³¹

In two recent women's cases dealing with the scope of protections in human rights law, the Manitoba Court of Appeal refused to recognize women as the class being discriminated against. In both cases, this resulted in women losing key cases dealing with sexual harassment and pregnancy. These decisions were appealed to the Supreme Court of Canada in June 1988 and section 15 arguments were made by LEAF.³²

In the case of *Janzen v. Platy Enterprises*,³³ the issue is whether sexual harassment is sex discrimination as prohibited by the *Manitoba Human Rights Act*.³⁴ The Manitoba Court of Appeal ruled that it is not. Discrimination, the Court said, means treating an individual as a member of a category. But in sexual harassment cases, according to the Court, a woman is harassed because of her individual characteristics, not just because she is a woman. Therefore, the Court concluded, sexual harassment is not sex discrimination and is not prohibited by the *Manitoba Human Rights Act*.

In *Brooks v. Canada Safeway Ltd.*³⁵ the same Court of Appeal upheld a lower court ruling, relying on *Bliss*,³⁶ in which it was ruled that discrimination because

of pregnancy is not discrimination based on sex, because not all women become pregnant.

In *Janzen*, no class is being discriminated against; individual women are singled out for sexual harassment because of their particular characteristics. In *Brooks*, the class being discriminated against is not women, it is only some women — those who are pregnant. In both cases, this refusal to recognize the class being discriminated against as the broader class of women results in a loss of basic protections.³⁷

In *Beltz*, the Court refused to recognize the narrower class of criminal lawyers, and in *Janzen* and *Brooks* the Court refused to recognize the broader class of women to which victims of sexual harassment and women who are pregnant belong. As these cases demonstrate, the court's recognition of the class to which the applicant belongs is crucial to the outcome of any case.

■ Setting the Boundaries of the Class

In *Streng v. Township of Winchester*,³⁸ the Ontario High Court of Justice defined the class at issue as all persons suffering personal injuries as the result of the negligence of others. Justice Smith then ruled that those whose injuries resulted from the negligence of a municipality should not have a more limited right to sue than other personal injury victims. The *Municipal Act*³⁹ specified that damage claims against the municipality must be initiated within three months. In this case the Court ruled that the plaintiff could sue the municipality, even though his claim was late, because he was deemed to be a member of the class recognized by the Court and he was being treated differently.⁴⁰

However, had the Court refused to recognize, as a class, persons suing municipalities or refused to recognize the larger class of persons suing for negligence (to which Streng could be compared), the outcome would have been completely different. In *Mirhadizadeh v. R.*,⁴¹ the Ontario High Court of Justice, dealing with a similar issue, refused to identify a broader class to whom the plaintiff could be compared. Mirhadizadeh sued the Ontario government for negligence, on the grounds that it failed to supply a sufficient number of trained guards at the Toronto jail and, as a result, he was injured by his fellow inmates. His claim was disputed by the Crown because it was not filed within the six months specified in section 11 of the *Public Authorities Protection Act*.⁴²

Like Streng, Mirhadizadeh argued that, because of the special limitation period, he was not treated the same as other persons suffering personal injuries because of negligence. Justice Steele rejected this argument, saying:

In the present case, all persons wishing to commence actions are subject to the same provision. There is no discrimination between one class of plaintiff and another. I see no merit in the argument that s. 11 creates a separate class of defendant, and thereby deprives the plaintiff of equal benefit of the law.⁴³

*Kask v. Shimizu*⁴⁴ and *Singh v. Dura*⁴⁵ are another pair of cases where different outcomes resulted from the differing ways the courts delineated the classes, and consequently the issue. In both cases, plaintiffs challenged Rule 59(1)(a) of the Alberta Rules of Court, which allows a defendant to obtain security for costs against

a plaintiff who does not reside in the province. Under the rule, a defendant can obtain a court order requiring an out-of-province plaintiff to pay the defendant a sum towards the cost of the court case before the case begins.

As discussed in Chapter Four, the apparent rationale for this rule is that, if the plaintiff is unsuccessful in the case, it may be more difficult for the defendant to recover costs if the plaintiff resides outside the province; therefore some security for costs should be provided at the beginning.

It was argued in these cases⁴⁶ that the rule discriminates on two grounds: between persons based on their ability to pay, and between in-province and out-of-province plaintiffs. In *Kask v. Shimizu*, Justice McDonald found that Rule 539(1)(a) violated section 15 because it denied equal access to a hearing in court for a poor woman who could not pay security for costs. He also found that it discriminated against out-of-province residents, but this was not the principal issue according to Justice McDonald.

Justice Berger, in *Singh v. Dura*, decided that Rule 539(1)(a) did not violate section 15 because persons resident in Alberta and those not resident in Alberta are not similarly situated. He identified the class only as out-of-province residents and concluded that they are not similarly situated to in-province residents because it is possible that a defendant could have more difficulty recovering costs from an out-of-province resident.

These judgements make it apparent that a judge's delineation of the classes is crucial to the outcome of the case and that this delineation is highly discretionary. In *Streng* and *Kask*, the courts recognize broader classes; in *Mirhadizadeh* and *Singh*, they do not. The result is that *Streng* and *Kask* enhance access to the courts, while *Mirhadizadeh* and *Singh* deny it. There is no analysis in the decisions that justifies these very different results.

The Comparison of Classes

After classes have been identified, the second step in the model set out in *R. v. S. (Sheldon)* is to compare them. Just as the way the court defines a class can determine the outcome, so can the way the court compares or fails to compare the classes it has identified. Sometimes the courts simply fail to make a comparison; and sometimes comparisons are tautological because the courts compare classes only within the terms already set out in the law. In all circumstances, the determination of who is alike and who is unlike is highly unpredictable, and in most cases conclusory of the outcome of the case.

■ Failure to Compare

In the case of *Father Don's Natural Products Ltd. v. Canada*,⁴⁷ the plaintiff argued that Rule 300(2) of the Federal Court Rules violates section 15 of the Charter because it requires corporations to be represented by lawyers in all federal court actions, while individuals can represent themselves. The Federal Court of Appeal could have, and in our view should have, compared corporations and individuals and ruled that corporations are not like human beings; section 15 is not designed to provide a basis for corporate litigation, and so corporations do not have equality

rights. However, instead, the Court chose to rule merely that there was no violation because all corporations are treated alike. "Accordingly," the Court said, "there can be no question of discrimination or inequality."⁴⁸

This case illustrates one of the ways the comparison of classes can go wrong: it can simply not happen. Father Don's argued that there was an inequality because the rules for access to the court were different for corporations and individuals. But no comparison between these classes was made; only the treatment within the class of corporations was considered. The Court failed to make a comparison between classes.

This is, of course, the same error that the Supreme Court of Canada made in its decision in the *A.G. Canada v. Lavell*⁴⁹ case under section 1(b) of the *Canadian Bill of Rights*. The Court ruled that there was no violation of section 1(b) because all Indian women were treated alike. No comparison was made between the treatment of Indian women and Indian men by the *Indian Act*,⁵⁰ even though this was the very heart of the women's case.⁵¹

■ Creating Tautologies

The Ontario Court of Appeal said, first in *R. v. Ertel*⁵² and later in *R. v. S. (Sheldon)*,⁵³ that classes should be compared on the basis of whether "the class purported to be treated differently from another class is similarly situated to that other class **in relation to the purpose of the law** . . ."⁵⁴ (emphasis added)

This would appear to add clarity to the exercise of determining when classes are similarly situated by providing a standard against which to measure. However, as commentators Lepofsky and Schwartz point out, the judge's definition of the purpose of the law is another exercise of discretion that determines the success or failure of the case. They write:

A court wishing to uphold the law, can define the law's purpose tautologically to fit closely the classes delineated in it. A court wishing to strike down the law can define the law's purpose to justify a finding of similar situation among differently treated classes . . . For example, the *Ertel* court decided that the purpose of the Criminal Code provision permitting preferred indictments⁵⁵ is to ensure flexibility in the Attorney General's administration of criminal justice. The court could just as well have defined the purpose as simply the preventing of unconscionable delay in commencing trial proceedings. But had it done so, preferred indictments would have been struck down as an overbroad method for achieving that objective. After all, an indictment can be preferred months, or even years, after the fact. By proceeding as it did, the court ensured a perfect fit of the statute's means (unfettered prosecutorial discretion vested in the Attorney General) with its judicially derived purpose of "ensuring flexibility". By declaring a tautologically formulated purpose the court guaranteed a finding that the means employed were reasonable and fair.⁵⁶

This tautological formulation of the purpose of the law occurs also in *Mirhadizadeh*⁵⁷ and *Singh*.⁵⁸ In both cases, the classes are defined and the comparison made within

the logic of the legislation itself; no perspective is brought to the analysis other than that of the challenged law. For the applicant, this means that there is no way to break out of the law that is the cause of the problem. It is a closed and self-perpetuating circle.

■ Comparing Classes: Likes or Unlikes?

The courts' decisions regarding which classes are similarly situated and which are not are also thoroughly unpredictable. This is illustrated by two major lines of cases, both dealing with the uneven effects of proclamation of new laws. These cases were chosen as illustrations because they deal with the very basic question of equal application of the criminal law. In cases such as these, one would expect to see logical consistency in the results of comparing classes. However, these cases show that it is not easy to predict who the courts will decide are likes or unlikes, similarly or differently situated.

The first line of cases deals with the effects of the uneven proclamation of drunk-driving provisions in the *Criminal Code*. Two new provisions dealing with drunk driving came into force when proclaimed on a province-by-province basis, although they are part of federal law applying throughout the country. One section⁵⁹ allowed courts, instead of fining or imprisoning drunk drivers, to discharge drunk drivers with an order that they undertake curative treatment for their alcohol problem. The other⁶⁰ required drivers to provide roadside breath tests. Some provinces proclaimed these sections, bringing them into force as law, while others did not. This created anomalies between persons charged with the same offences in different provinces. Ontario residents charged with drunk driving did not have access to the curative treatment provisions, while persons charged with the same offence in other provinces did. In Ontario, a driver had to provide a roadside breath test; in British Columbia, a driver did not.

In the second line of cases, anomalies were created by the introduction of the *Young Offenders Act*.^{61,62} This new federal law sets out procedures and establishes special courts for dealing with young persons charged with criminal offences. It defines a young person as someone between 12 and 18 years of age. The Act makes the definition standard for the country, but prior to its proclamation on April 1, 1985 the provinces had different definitions of a young person. In Ontario and Alberta, a 16-year-old was an adult; in British Columbia, a 16-year-old was a young person. Because of this, when it was proclaimed, the *Young Offenders Act* produced anomalous results. Sixteen-year-olds in Ontario who were charged with offences before April 1, 1985 were tried in adult court, while 16-year-olds charged with offences after April 1, 1985 were tried in youth court. Also, 16-year-olds in British Columbia who committed offences before April 1, 1985 would be tried in youth courts, but 16-year-olds in Alberta who committed offences at the same time would be tried in adult courts.

In both the drunk-driving and the young offender cases the problem before the courts was the same: because of the effects of proclamation or non-proclamation of new laws, accused persons were receiving different treatment depending on their province of residence and the date when the offence was committed. In both sets of cases, the courts had to decide whether the defendants were entitled to the least

punitive treatment because of the inequities created by the differential application of the law. Despite the similarities between the facts in these two lines of cases, the courts came to very different conclusions. In one line of cases, the majority of defendants in different provinces were deemed to be similarly situated; in the other line of cases, they were not.

In *R. v. Hamilton*,⁶³ the Ontario Court of Appeal found that the non-proclamation in Ontario of the curative treatment provisions of the *Criminal Code* constituted a violation of section 15. When this case was heard, the curative treatment provisions were in force in five provinces and two territories but not in Ontario.

In his decision, Justice Dubin said:

I think it is clear that as a general rule it is fundamental that the criminal law treat all individuals in like circumstances equally . . . The equal application of the criminal law, once enacted, cannot depend upon the acquiescence of the provincial Attorneys-General. For example, in the event that the *Criminal Code* were amended to reintroduce capital punishment, I think that it would be an untenable proposition that its uniform application would be subject to the will of each province.⁶⁴

The reasoning in *R. v. Hamilton* was relied upon in a number of cases dealing with roadside breath tests. Prior to December 4, 1985, when it was proclaimed in force throughout Canada, the roadside breath test provision was not in force in British Columbia or Quebec. Thus, challenges were raised in the other provinces where it **was** in force. In a majority of these cases, the courts found that between April 17, 1985, when section 15 of the Charter came into effect, and December 4, 1985, the roadside breath test provision was invalid because it did not apply equally in all parts of Canada.⁶⁵ Courts dismissed charges against persons who refused to provide breath tests. The courts held that residents in provinces where the breath test provisions were in effect were similarly situated but did not receive the same treatment as residents in provinces where they were not in effect. The lack of uniform proclamation of the breath test provision was found to violate section 15 in approximately two-thirds of the decisions. In a majority of cases where no violation was found, the reason given was that section 15 was not in effect at the time.

The results of the *Young Offender Act* cases differed from the drunk-driving cases, although the problem before the courts due to the effects of proclamation was the same. The different treatment young offenders received, depending on when and where an offence was committed, did not lead the courts to find section 15 violations. In *Re McDonald and The Queen*,⁶⁶ the Ontario Court of Appeal found that those who committed offences before April 1, 1985 and those who committed offences after that date were not similarly situated and therefore could not be compared (on the basis of equality). Neither, the Court said, were 16-year-olds in Ontario who committed an offence during the same period similarly situated to 16-year-olds in British Columbia.

While the Court declared that these classes are not similarly situated, its decision does not appear to turn on that finding. The Court found that remedying this problem

of different treatment would require shifting cases started in adult courts to youth courts; this would result in "a substantial and unplanned-for increase in the youth court caseload and, in many cases, in legal confusion."⁶⁷

In addition, the Court found, it would result in inequality! On behalf of the Court, Justice Morden said:

Persons of the same age who committed offences during the same period when a particular law was in force describing the consequences relating to a conviction would not be treated equally. The distinction, depending on whether the proceedings were finally terminated before or after 17th April 1985, would be an arbitrary and capricious one. It would turn the administration of justice into a game and would ignore the important principle of justice that equals should receive equal treatment.⁶⁸

The Court finds that section 15 does not require treating Ontario 16-year-olds and B.C. 16-year-olds the same because to do so would create a difference between those whose cases were completed before the Charter came into effect and those whose cases were not. Yet in the later drunk-driving decision of the same Court in *R. v. Hamilton*, no similar concern was expressed. Indeed, in *R. v. Hamilton* those whose drunk-driving cases were not completed by April 17, 1985 were found to be entitled to the benefit of the curative treatment provisions, even though they were not in force at the time in Ontario.^{69,70}

It is difficult to rationalize the courts' findings that residents of different provinces must be treated the same under the *Criminal Code* but can be treated differently under the *Young Offenders Act*. The subject matter of the two laws is the same: the regulation of criminal offences. And the problem before the courts was the same: anomalies created by proclamation and non-proclamation of new provisions in the law. Why are residents of Ontario and British Columbia similarly situated in one group of cases and not in the other?

Considering these cases and many others included in this study, there is an inescapable conclusion. The similarly situate test is simply an overlay for judicial discretion. Decisions that are based on undisclosed reasons or reasons irrelevant to equality are justified by applying the similarly situate test to produce the result deemed appropriate.

The sands shift often and disconcertingly in the application of this model. Setting out the steps for analysis, as was done in the *Ertel* and *S. (Sheldon)* cases, does not improve the model if the decisions inherent in each step are purely discretionary. Nor does it help to develop criteria for comparison, such as that it must be in relation to the purpose of the law, when each judge can decide differently what the purpose of any law is, depending on what outcome he/she believes is the correct one in the case in question.

As we have seen, deciding the boundaries of the class, the purpose of the law, and whether the classes are comparable determines the outcome of the case. But

there is no consistency in how these decisions are made and no rational pattern to the outcomes.

A False Test

For women and other disadvantaged groups, the most important flaw in the similarly situate test is that there is no fundamental truth to it. It does not assist judges to identify and address the real equality issues; rather, it keeps them away from these issues. It is also potentially perverse, since it has the capacity to perpetuate inequality and disadvantage. Three major decisions illustrate the depth of this falsity.

■ Karen Andrews

The first of these cases is [Karen] *Andrews v. Ontario Ministry of Health*.⁷¹ Karen Andrews applied for Ontario Hospital Insurance Plan (OHIP) coverage. She requested that OHIP provide the same dependant coverage to herself and her lesbian partner as is provided to heterosexual couples. Karen Andrews and Mary Trenholm had lived together in a lesbian relationship for nine years. Trenholm's two teenage children lived with them.

Karen Andrews was employed by the Toronto Public Library Board. The Board was willing to pay the premiums for dependant coverage for Andrews and her family, but the Ontario Hospital Insurance Commission refused the coverage. The *Health Insurance Act*⁷² defines dependant simply as "a resident who is (i) the spouse of an insured person . . .". The Commission said that it considered a spouse to be a person of the opposite sex, even though it does not require that the spouses be married, that there be any period of cohabitation to qualify, or that there be any proof that the relationship is a permanent one.

Karen Andrews and Mary Trenholm sued, pursuant to section 15 of the Charter. It was argued on their behalf that, to the extent that the Act precludes coverage for spouses of the same sex, it contravenes section 15.

Justice McRae found that homosexual couples were not similarly situated to heterosexual couples. He said:

Heterosexual couples procreate and raise children. They marry or are potential marriage partners and most importantly they have legal obligations of support for their children whether born in wedlock or out and for their spouses pursuant to the *Family Law Act*, S.O. 1986, c. 4, ss. 30-33. A same sex partner does not and cannot have these obligations.⁷³

The Court found that Karen Andrews and Mary Trenholm were like single people and that they were treated the same as single people; there was no violation of the Charter. In other words, the Court found that Karen Andrews and her partner were not like heterosexuals because they had not been treated like heterosexuals by the law. Therefore, they could not gain access to the benefit of section 15.

The circularity of this argument is evident. But it also illustrates the fundamental falseness and perversity of the similarly situate test. First, the test does not help the court get at the truth. It does not encourage the court to ask whether there

is a problem of longstanding disadvantage or prejudice inherent in the circumstances. It does not lead the court to explore the full social dimensions of the case, or even to grapple fully with the facts. Rather, it encourages the court to concentrate on superficial comparisons with other classes.

Second, disadvantaged groups typically do not have recognition in law, or status, or access to power. As this decision shows, a disadvantaged group like lesbians can be found not to be similarly situated precisely because it does not enjoy these advantages. The disadvantaged **are** disadvantaged. Because they are disadvantaged, they are found not to be similarly situated with those to whom they are compared. Consequently, their disadvantage is perpetuated, and the court, by its decision, sanctions and legitimizes continuing discrimination.

■ Owen Swain

Continuing discrimination is also sanctioned in two cases dealing with mental disability, *R. v. Swain*⁷⁴ and *Rebic v. R.*⁷⁵ In both cases, the law at issue is section 542(2) of the *Criminal Code* which provides that, where a person is found not guilty by reason of insanity, the judge must order that the person be kept in strict custody "until the pleasure of the Lieutenant Governor of the province is known". This separate scheme for mentally disabled, accused persons creates serious inequities.⁷⁶ The system has drawn much criticism over the last ten years. Advocates, parliamentary committees, and the Law Reform Commission of Canada have all recommended change.⁷⁷

Although the separate system for mentally disabled accused persons has many weaknesses, there are three central inequities.

First, a person who is found to have been insane at the time an offence was committed is assumed to be a present and continuing danger to the public. The law does not permit any consideration of the state of the accused at the time of trial, even though the charge and the trial may be separated by years. No matter what assessment the court may make of the accused's situation, and what alternatives to incarceration might be appropriate, incarceration is mandatory. There is no equivalent of a sentencing hearing for a person found not guilty by reason of insanity. Persons found to be insane at the time of an offence must be ordered into strict custody even if they were never dangerous, or are no longer dangerous or in need of treatment.

Second, detention is for an indefinite period, at the Lieutenant Governor's pleasure. There are no fixed sentences. Detention pursuant to a Lieutenant Governor's warrant (LGW) can be for a longer period than the maximum punishment for the offence.

Third, the *Criminal Code* scheme allows the Lieutenant Governor of a province to appoint a Review Board to advise him/her regarding the detention of the accused. However, he/she is not required to follow the advice of his/her Review Board and can consult anyone, make any decision he/she deems appropriate on the detention of a person, or make no decision at all. Although the Lieutenant Governor is the decision-maker with the authority to detain or release, the *Criminal Code* does not give detained persons a right to a hearing before him/her.

In 1983, Owen Swain was charged with assault and aggravated assault of his wife and two children. After brief treatment at Penetanguishene Mental Health Centre, he lived successfully in the community, saw a psychiatrist regularly, took prescribed medication, and returned to live with his family.

Sixteen months after the charges were laid, Swain's trial was held. Over the objection of Swain's lawyer, the Crown was permitted to present evidence that Swain was insane at the time of the offence. Swain was found not guilty by reason of insanity.

Although it was the opinion of the psychiatrist called by the Crown that nothing in Swain's medical condition called for incarceration, the Court had no choice but to order that he be placed in strict custody. Therefore, following his acquittal he was remanded to Queen Street Mental Health Centre and held under a Lieutenant Governor's warrant. Three months later, when his case was appealed to the Ontario Court of Appeal, he was still in custody.

In *Rebic v. R.*, the accused was found not guilty by reason of insanity on a charge of threatening to use a weapon while committing an assault. He also appealed this verdict on section 15 grounds.

At the Court of Appeal level in both *Swain* (Ontario) and *Rebic* (British Columbia), the issues of equality for mentally disabled persons were framed in same treatment terms. The question before the Court was stated this way in *Rebic*:

The appellant submits that to treat a mentally disabled person in a different way from other persons who are acquitted of the same criminal offence is a breach of s. 15(1) of the Charter.⁷⁸

In *Swain*, the Court was asked to find that persons found not guilty by reason of insanity were similarly situated to persons who were simply found not guilty, and that persons detained under LGWs were similarly situated to persons who are committed to mental hospitals under provincial mental health acts. In both circumstances, it was argued that persons found not guilty by reason of insanity were treated more harshly.

In both *Swain* and *Rebic*, the courts found that persons found not guilty by reason of insanity are not like others, and therefore a separate system for them is permissible. In *Rebic*, Justice Esson, speaking for the majority of the British Columbia Court of Appeal, said:

The broad principle is that "likes should be treated alike" or, as it is sometimes put, those who are similarly situated must be treated similarly. The appellant submits that that principle is offended by s. 542(2) because a person acquitted by reason of insanity is treated differently from all others acquitted of an indictable offence. An acquitted person is entitled to go, free of consequences resulting from the charge, unless he has been acquitted by reason of insanity. In that case, he must be ordered to be kept in strict custody. I agree that the person found guilty by reason of insanity is differently treated. But, if he is differently situated, that does not create an

inequality. So the question is whether he is differently situated. I think he is.⁷⁹

In *Swain*, Justice Thorson, speaking for the majority of the Ontario Court of Appeal, wrote similarly:

As was held by this Court in *Re McDonald and the Queen* . . . s. 15(1) of the Charter requires that those who are similarly situated be treated similarly. I do not accept that an insane acquittee and a person who has been acquitted **simpliciter** are similarly situated. In the case of an insane acquittee, like Mr. Swain, it has been found at trial that he committed the acts charged, and at the time he committed them, he was insane. This finding raises questions as to his dangerousness to society and his need for treatment for his mental disorder. Section 542(2) is the first step towards answering those questions, and answering them within a system the very existence of which, in my opinion, recognizes that those questions are qualitatively different from the kind of questions that are generally thought of as being appropriate for decision by a criminal court.

Similarly, I do not accept that an insane acquittee and a . . . [person committed to a mental hospital under a provincial mental health act] are similarly situated. Presumably the latter's behaviour will not have given rise to any criminal charge being brought against him . . .⁸⁰

These cases illustrate how difficult it is for a disadvantaged group, like mentally disabled persons, or persons so labelled, to break out of their assigned place and to crack the conditions that confine them.⁸¹

There is a basic liberty issue at stake here for a group recognized by section 15 as a disadvantaged group. In these circumstances, the equality guarantee should open the LGW system to serious re-examination and re-evaluation. The courts should be asking such questions as these: Should mentally disabled persons have fewer procedural safeguards in law because they are disabled? Are persons labelled mentally disabled not entitled to procedures that accord with the principles of fundamental justice? Should a judge not have some discretion to determine whether incarceration is appropriate in a given case? If an assessment of mental health is required, should there not be some procedural safeguards instead of open-ended detention? Instead, the similarly situate test diverts the Court into asking and answering superficial questions, which serve only to justify the existing system.

One of the characteristics of this test is that it does not focus the courts' attention on the facts, or it allows the courts to gloss over the facts by turning attention to the artificial game of determining who is similarly situated. Mental disability cases illustrate this weakness well. The model blocks the courts' capacity to hear the real nature and dimensions of the inequality before them, by assuring them that only superficial comparisons need be made.

And, again, the similarly situate test sanctions discrimination. In *Swain* and *Rebic* the courts find that unequal results are justified because of disability. Disabled

persons are different, therefore different outcomes or different treatment are appropriate. This reasoning is completely defeating to disability cases. If a disability is a justification for inequality, disability cases cannot win. Disabled women and men should not have to prove that they are similarly situated to non-disabled people in order to claim the protections of sections 7 and 15 of the Charter. If they do, these guarantees are meaningless for them.

■ Henry Morgentaler

In the Ontario Court of Appeal decision in *R. v. Morgentaler*,⁸² the equality issue was also obfuscated by the similarly situate test. This case challenged the constitutionality of section 251 of the *Criminal Code*, which provided that abortions were illegal unless approved by a hospital committee. In Dr. Morgentaler's defence, it was argued that section 251 violated the equality guarantees by restricting women's access to abortions and requiring them to have the permission of a committee. The Ontario Court of Appeal ruled that section 251 did not violate the Charter and, on the section 15 question, adopted the argument of the Attorney General of Ontario. The Court said:

There is nothing on the face of s. 251 or inherent or implicit in its wording that discriminates between individuals on the basis of race, national or ethnic origin, colour, religion, . . . sex, age, or mental or physical disability.

It is true that abortion, as a matter of biological fact, relates only to women. However, that fact does not make the section discriminatory on the basis of sex. It would not apply to men and the argument would be without any substance to say that the legislation is discriminatory or causes inequality before the law because it does not require men seeking an abortion to comply with s. 251. As Ritchie J. said in *Bliss v. A.-G. Can.*, . . . "Any inequality between the sexes in this area is not created by legislation but by nature."⁸³

Locked into the similarly situate test, which requires only glib comparisons, the Court cannot perceive the equality issue.

If one sets the similarly situate test aside, however, the equality issue becomes easy to discern. Women cannot be equal members of society if, because of their childbearing capacity, their access to health care is obstructed, their liberty to make important decisions intimately affecting their private lives is interfered with, or their control over their own bodies is removed.⁸⁴

In each of these cases, a law treats members of a disadvantaged group disadvantageously because they belong to that group. Karen Andrews can be denied health benefits because she is lesbian. Owen Swain can be incarcerated because he is mentally disabled. Women can be denied their security rights because they are child-bearers. The similarly situate test, founded as it is on formal equality theory, does not assist the court to break out of the entrenched patterns of thinking that have justified discrimination against these groups. It does not allow the court to acknowledge and address entrenched disadvantage. On the contrary, it confirms and

permits the continuation of the patterns of discrimination precisely because these groups are not like able-bodied heterosexual males.

The Reasonableness Test

The British Columbia Court of Appeal first articulated the reasonableness test for section 15 violations in its decision in the case of [Mark] *Andrews v. Law Society of British Columbia*,⁸⁵ which dealt with the requirement of the Law Society that members be Canadian citizens. In the decision on this case, Justice McLachlin, writing for the Court, articulated a new interpretive test for section 15. She decided that the words "without discrimination" in section 15 mean that a distinction must be proven to be unreasonable and unfair in order to constitute an equality rights violation. The test of reasonableness used in this decision is not a substitute for the similarly situate test, but an addition to it. It has been applied by many other courts,⁸⁶ and although it has also been repudiated by some, it has become a significant element of developing equality rights doctrine.

The rationale for the reasonableness test begins from the same point as the rationale for the similarly situate test. In the *Mark Andrews* judgement, Justice McLachlin agreed with other courts that equality cannot mean that **any** distinction will trigger section 15 scrutiny by the courts, because this would result in opening the door to endless claims against all government legislation. She noted that laws classify and differentiate between groups; the essential requirement of equality is not that everyone always be treated the same, but that likes be treated alike and unlikes unlike. In addition, she said that only denials of equality that **discriminate** are violations of section 15. Therefore, she said, it is necessary to consider what the phrase "without discrimination" means in section 15.⁸⁷

She concluded that discrimination must be read as having a "pejorative connotation". She then posed two questions: What is the nature of the analysis to be undertaken under section 15, and what is the role of section 1? In answer to her first question she wrote:

My response to the first question is that the question to be answered under s. 15 should be whether the impugned distinction is **reasonable or fair**, having regard to the purposes and aims and its effect on persons adversely affected. I include the word "fair" as well as "reasonable" to emphasize that the test is not one of pure rationality but one connoting the treatment of persons in ways which are not unduly prejudicial to them . . . The ultimate question is whether a fair-minded person, weighing the purposes of legislation against its effects on the individuals adversely affected, and giving due weight to the right of the legislature to pass laws for the good of all, would conclude that the legislative means adopted are **unreasonable or unfair**. (emphasis added)

Then she turned to the second question:

What is the role of s. 1 on this approach? As already noted, the proper function of s. 1 is to permit limitations to be imposed upon the rights and freedoms guaranteed in the sections which follow it, where such

limitations are demonstrably justified. It follows that s. 1 will function so as to permit legislation which is discriminatory to be upheld, provided the necessary conditions are met. It may well be that generally discrimination cannot be justified in a free and democratic society. But it is not true that it can never be justified. Circumstances may arise where discriminatory measures can be justified. For example, in times of war, the internment of enemy aliens might be argued to be justifiable under s. 1, notwithstanding the fact that this is discriminatory and would not be tolerated in peace time. Viewed thus, s. 1 plays a vital role in the determination of the validity of legislation impugned on the basis of s. 15. The role, while essential, is limited; most cases may not disclose circumstances which can be argued to justify discriminatory legislation. This, in my view, is as it should be.⁸⁸

Justice McLachlin's rejection of a strictly formal approach to equality would be a positive development for women if her interpretation of "without discrimination" provided a means to recognize disadvantage. We agree that the courts should not be burdened with reviews of every legislative differentiation. Difference is not what inequality is about. The phrase "without discrimination" in section 15 should remind the courts of human rights legislation and the interpretations that have emerged in human rights jurisprudence. And it should permit the courts to ask: Does the impugned law or program perpetuate the inequality of a disadvantaged group? Unfortunately, however, Justice McLachlin's approach does not turn the court's attention towards disadvantage; rather, it turns it to government irrationality.

The test in the *Mark Andrews* case has a number of serious flaws:

- it runs together the analyses of section 15 and 1, which should be analytically distinct;
- it reverses the burden of proof;
- it opens the door to judicial discretion under the cover of "reasonableness";
- it focusses on the purpose of the impugned law or policy, rather than its effect; and
- it suggests that discrimination would be justified under section 1 in times of war and crisis.

These five points are discussed in detail below.

First, this interpretation runs together the analyses of sections 15 and 1, which, according to *R. v. Oakes*,⁸⁹ should be analytically distinct. In *Oakes*, the Supreme Court of Canada noted that other rights documents, such as the *Canadian Bill of Rights*, did not contain a separate limits section comparable to section 1. In the absence of such a section, the Court said, it is reasonable to read rights as having inherent limits. Given the different structure of the Charter, however, it is "highly desirable" to separate the analysis into two components, the Court concluded.⁹⁰

Despite the Supreme Court of Canada's 1986 statement on the desirability of separating the analyses of rights and limits, other Canadian courts have continued to develop and apply interpretations of section 15 that collapse them.

For women it is threatening enough that section 1 allows constitutionally protected equality rights to be overridden. It is even more threatening that a reasonableness test has been imported into section 15, thus subjecting equality guarantees to reasonable limits twice — once in section 15 and once in section 1. The *Mark Andrews* decision and the line of decisions supporting it have been criticized by Justice Hugessen of the Federal Court of Appeal in his decision in the case of *Smith, Kline & French Laboratories Ltd. v. A.G. Canada*.⁹¹ He said:

The difficulty I have with those decisions, as I understand them, is that they conclude that the ultimate test as to whether any given legislative category is in breach of s. 15 is whether it meets the twin standards of reasonableness and fairness. With respect, I find this test impossible to reconcile with the teaching of *Oakes*, *supra*. If a category must be shown to be unreasonable or unfair before it can be said to give rise to a breach of equality rights, it is difficult to see how there can ever be room for application of s. 1. In my view, *Oakes* requires that any test of the content of s. 15 must be both logically and analytically distinct from s. 1.⁹²

The effect of the *Mark Andrews* interpretation, then, is to import the section 1 criteria of reasonableness and justifiability into section 15 analysis.

The second flaw of the test of reasonableness in this case is that it reverses the burden of proof between the applicant and the respondent, requiring the applicant to prove that discrimination is unreasonable, rather than requiring the respondent to show that the discrimination is a reasonable limit on equality. Injecting a reasonableness test into section 15 requires the applicant to show not just that discrimination has occurred, but also that the discrimination is unreasonable and unfair. As a result, the onus does not shift to the respondent under section 1 until the applicant has proven that the discrimination has occurred and that it is unreasonable.

There is a terrible irony in this. Disadvantaged people, who have all of the weight of society's traditions against them, have to prove not just that there is discrimination against them, but that the discrimination against them is wrong. Reading section 15, one would have thought that this is self-evident. Women cannot see this requirement as evidence of an open commitment to their equality. Reminiscent of women's experience in other areas of law, it appears that, once more, the onus is on the victim to prove that she should not have been battered.

In addition to the irony of requiring women to prove that discrimination against them is illegitimate, the reasonableness test requires applicants to show that the discrimination is unreasonable from a government point of view. This is both an improper burden of proof and one that applicants are ill-suited to discharge. The information needed for this proof is within the knowledge of the government or other respondent, not the applicant. If government perceptions of reasonableness are

relevant, and we do not agree that they are, it is sensible that the onus should be on government to produce the proof of reasonableness, rather than on the applicant to prove unreasonableness.

This onus on the equality-seeker is unusual and in our view improper. It is established law in the human rights field that the complainant has the onus of establishing a *prima facie* case of discrimination, and that if she is successful in establishing it, the respondent has the onus of justifying the discriminatory treatment.⁹³ The reasonableness test ignores this developed analytical framework from human rights jurisprudence and the inherent wisdom and fairness of it.

The third flaw is that the test developed to determine reasonableness inside section 15, as set out in *Mark Andrews*, is wide open and woolly.⁹⁴ Indeed, the section 15 reasonableness test appears to be simply another cover for judicial discretion, as is the similarly situate test. The test of reasonableness, according to *Mark Andrews*, is whether:

... a fair-minded person, weighing the purposes of legislation against its effects on the individuals adversely affected and giving due weight to the right of the legislature to pass laws for the good of all, would conclude that the legislative means adopted are unreasonable or unfair.⁹⁵

Since it is the judge who decides what this imaginary fair-minded person would conclude, it appears that the judge and the fair-minded person are for all practical purposes one and the same. The test is no test at all, then, but simply an invitation to the court to pass judgement on whether it considers the inequality complained of to be unreasonable or unfair.

Lepofsky and Schwartz, examining the reasonableness test developed by the Ontario Court of Appeal in *Ertel*, a post-*Mark Andrews* decision, found the same problem. They say:

... *Ertel's* definition of discrimination is ... so amorphous and open-ended as to be incapable of objective application. Under it, section 15 cases will tend to degenerate into an evidentiary fight over the wisdom of the impugned law and nothing more.

This problem becomes manifest when the very terms of *Ertel's* definition of discrimination are explored. How does a court ascertain whether a law's purpose outweighs its effect on the individual? How much does a particular purpose or effect weigh? In determining a law's reasonableness, the court requires that "due weight" be given to the right of the legislature to pass laws for the good of all. How much weight is "due" under this criterion? Does this mean that a court should defer readily to a legislature's judgment calls (leading to the likely upholding of impugned laws), or does it require careful judicial scrutiny of laws brought under attack (leading to their more frequent invalidation)? When is a democratically enacted law fair, unfair, reasonable or unreasonable? Ultimately, this "test" is not a

yardstick for discrimination; it is a prescription for constitutional rulings based on judicial preference, and nothing more.

To do battle over whether a law is fair, [or] reasonable . . . parties will be driven to file evidentiary records and conduct cross-examinations focusing in the end on one central question — is this a good law or a bad law? Courts will be forced to wade through such materials in order to reach conclusions on the wisdom of the challenged enactment. Principled reasoning will be replaced by the personal predilection of judges, not because of any judicial impropriety, but because of the very nature of the task which *Ertel* imposes on them.^{96,97}

The fourth problem is that the reasonableness test focusses on the purpose of the law or policy. While in *Mark Andrews* the Court did refer to "the effect on persons adversely affected", the reasonableness test is concerned principally with purpose, as can be seen from the Court's application of the test in this decision.

Purpose must be assessed by examining the intent of legislators or policy-makers. This shifts the inquiry from the perspective of the applicant to the perspective of government. The question becomes whether the impugned law is reasonable or fair from government's perspective.⁹⁸

That a reasonableness test is indeed an inquiry into government's purposes⁹⁹ and that it is indeed reasonableness from government's point of view that is being canvassed was underlined by *R. v. Rebic*,¹⁰⁰ a second decision of the British Columbia Court of Appeal released on the day after *Mark Andrews*. In *Rebic*, Justice Esson cited with approval Justice McIntyre in a *Canadian Bill of Rights* case, *MacKay v. R.*,¹⁰¹ in which he said:

I would be of the opinion, however, that as a minimum it would be necessary to inquire whether any inequality has been created for a valid federal constitutional objective, whether it has been created rationally in the sense that it is not arbitrary or capricious and not based upon any ulterior motive or motives offensive to the provisions of the *Canadian Bill of Rights*, and whether it is a necessary departure from the general principle of universal application of the law for the attainment of some necessary and desirable social objective. Inequalities created for such purposes may well be acceptable under the *Canadian Bill of Rights*.¹⁰²

Justice Esson endorsed McIntyre's approach and said that "[c]onsiderations of the kind referred to by Justice McIntyre must enter into the question whether there has been a breach of s. 15(1)."¹⁰³

This leads one to suspect that the reasonableness test in *Mark Andrews* and the "valid federal objective test" developed under the *Canadian Bill of Rights* may be one and the same thing. It also makes it more than evident that, with the *Mark Andrews* test, it is not effects alone that determine whether there is discrimination contrary to section 15; the circumstances of the equality applicant may not even be the principal focus for determining whether a violation has occurred. This means

that, although the Supreme Court of Canada has found that inquiry into intent is no longer necessary for proving discrimination in human rights law,¹⁰⁴ intent may be determinative again in constitutional equality rights law.¹⁰⁵

Whether women are applicants using the section 15 guarantee to challenge systemic inequalities, or intervenors attempting to forestall men's use of section 15 to attack benefits and protections for women, the reasonableness test does not assist them. It may allow a judge to uphold a gender-specific program, but only where the program is deemed to be for a purpose that is reasonable and fair from government's perspective, which may have nothing to do with whether the program is necessary to create conditions of equality for women. This test, like the similarly situate test, diverts the court's attention away from the effects of discrimination on women and from conditions of disadvantage.

Fifth, the *Mark Andrews* description of the role of section 1 is unsettling. It is not reassuring to disadvantaged groups that the Court finds that discrimination might only be justified in a time of war and therefore that section 1 may have a limited role. Experience in Canada and around the world has shown that while discrimination occurs all the time, it can be extreme in times of war or crisis. In addition to assisting in the advancement of equality, the Charter should be a bulwark against the acts of a hysterical government or a panicked majority. It is because of the power of a supreme law to control the conduct of governments, and because of the demonstrated need for that control in recent history, that Canadians supported the entrenchment of the *Canadian Charter of Rights and Freedoms*. Yet in *Mark Andrews*, the Court finds that it would be justifiable under section 1 in a time of war to override the equality rights of "enemy aliens" in order to intern them. This appears to be an approving reference to Canada's internment of Canadians of Japanese descent. The Court indicates that, far from preventing such a thing from happening again, section 1 may allow the Court to repeat it. This is a deeply disturbing view of the role of section 1.

The Ontario Court of Appeal has said that its test is not the same as the *Mark Andrews* test, but it is.¹⁰⁶ Following the first two steps in its section 15 analysis — that is, the identification of classes and the comparison of classes to determine whether they are similarly situated — the Ontario Court of Appeal articulated the third step in its section 15 analysis in this way in *R. v. Ertel*:

The initial question to be answered is whether or not . . . [the applicant] is subject to an inherent disadvantage. If so, is the distinction so unfair as to be discriminatory, having regard to the purpose and effect of the legislation . . . factors such as fairness, rationality and justifiability deserve some consideration in determining whether a particular distinction is discriminatory, having regard to the purpose and effect of the impugned legislation.¹⁰⁷

This same step was described this way in *R. v. S. (Sheldon)*:

(3) a determination as to whether the difference in treatment is "discriminatory" in the sense of a pejorative or invidious or disadvantageous purpose or effect of the law or action impugned.¹⁰⁸

Justice Tarnopolsky, writing for the majority of the Court in *S. (Sheldon)*, went on to say:

As has been noted in *Ertel, supra* and *McKinney, supra* the third step in this test is somewhat more difficult. This court has adopted the approach that the discrimination must not constitute merely differences, but must be "tangibly adverse" (*McKinney, supra* at p. 55) . . . However, there is more to this third step which makes it more difficult. Something more than a disadvantage must be found. Is the disadvantage "so unfair as to be discriminatory, having regard to the purpose and effect of the legislation"? (The test in *Ertel, supra*.) Is it so "invidious", "unfair", "irrational", "adverse", or "prejudicial" as to be discriminatory? (The descriptions noted in *McKinney, supra*.)¹⁰⁹

In *McKinney*, the Ontario Court of Appeal attempted to distinguish its test from that used in *Mark Andrews* by saying that it does not require that the plaintiff prove unreasonableness under section 15; the Court went on to find that such a requirement is wrong because the burden of proof, which should properly fall on the respondent, is shifted to the challenger.¹¹⁰ However, the fact that the Ontario Court of Appeal did not use the word "unreasonable", because reasonableness belongs to section 1, does not make the test in *Ertel/S. (Sheldon)* different. As long as the applicant must show not just that there has been discrimination, and not just that it creates a disadvantage, but also that it is irrational, unfair, invidious, adverse, or prejudicial, this is a distinction without a difference. There is no difference between the tests in *Mark Andrews* and *Ertel/S. (Sheldon)*, either in where the burden of proof lies or in the content of what must be proven.

The effect on equality applicants is the same. After making out a *prima facie* case that there is discrimination, the applicant is put to the extra test of proving that the challenged law or policy is irrational or unjustifiable. As with the test in *Mark Andrews*, this turns the focus of section 15 inquiry to the government or respondent and to the government's perspective. The quotation from *MacKay in Rebic* indicates specifically that inquiry into rationality is an inquiry into government intent, and the test in *Ertel/S. (Sheldon)*, like that in *Mark Andrews*, calls specifically for judicial scrutiny of the purpose of the challenged legislation or policy in order to determine whether it is discriminatory. As with the test in *Mark Andrews*, the roles of sections 15 and 1 are blurred.

Although both the British Columbia Court of Appeal and the Ontario Court of Appeal have said that they have not improperly injected section 1 criteria into section 15, they clearly have; this means that equality applicants are faced with two reasonableness/irrationality tests — one in section 15 and one in section 1. Importing a judge-made test of reasonableness into section 15 waters down equality guarantees, just as District Court Judge Killeen suggested in *Re Wright and A.G. Canada*.¹¹¹

Conclusion

Neither formal equality theory nor the similarly situate and reasonableness tests, which have been developed as analytical tools to support it, have any definitional content that recognizes the persistent disadvantages of major groups in Canadian society or creates a framework for addressing them. Human rights jurisprudence has been disregarded as a source of guidance on the subject of equality and discrimination.¹¹² This means that the courts have ignored some major truths already recognized in law.

Inequality affects groups; entrenched patterns of discrimination must be examined. Intent is not pertinent to a determination of whether discrimination has occurred; the effect of a law or practice is. Instead of incorporating these principles into their tests, however, the courts have fastened on the more familiar *Canadian Bill of Rights* criteria to define discrimination — an absence of same treatment and government irrationality or unfairness. It seems obvious, even at this early stage in the development of section 15 interpretation, that if these tests are upheld by the Supreme Court of Canada, women and other disadvantaged groups will be disappointed in their hope that the Charter can advance equality.

Endnotes

1. See Postscript: *Mark Andrews* for authors' comments on the Supreme Court of Canada's decision in *Andrews v. Law Society of British Columbia* (2 February 1989), [unreported] [hereinafter *Mark Andrews*] and its potential impact on these tests.
2. See *McKinney v. University of Guelph* (1987), 63 O.R. (2d) 1 (C.A.), which repudiates the approach of the British Columbia Court of Appeal in *Andrews v. Law Society of British Columbia* (1986), [1986] 4 W.W.R. 242 (B.C.C.A.) [hereinafter *Mark Andrews*] that the question to be answered under s. 15 should be whether the impugned distinction is reasonable or fair, having regard to its purposes, aims, and effects on persons adversely affected. However, see *R. v. S. (Sheldon)* (1988), 26 O.A.C. 285 (C.A.), in which the third step of the test in *R. v. Ertel* (1987), 20 O.A.C. 257 (C.A.) inquires whether the disadvantage is so unfair, irrational, invidious, etc., as to be discriminatory.
3. See, for example, *Reference Re Sections 32 and 34 of the Workers Compensation Act (Nfld.)* (1987), 67 Nfld. & P.E.I.R. 16 (Nfld. C.A.), which adopts both the same-treatment model and the reasonableness test.
4. We are indebted to Andrew Petter for this formulation of the different definitions of equality.
5. Aristotle, *Ethics*, Book III.
6. See *Cowan v. Commissioner of Yukon Territory* (15 May 1985), judgement without reasons, registry no. 153.85 (Y.T.S.C.); and *Paul v. Registrar General, Vital Statistics Act* (9 December 1985), Toronto 2618/85 (Ont. S.C.); *R. v. S. (Sheldon)*, *supra*, note 2 is a subsequent decision of the Court.
7. See Catharine MacKinnon's discussion of the question of equality in "Making Sex Equality Real" in L. Smith et al., eds., *Righting the Balance: Canada's New Equality Rights* (Saskatoon: Canadian Human Rights Reporter, 1986) at 37.
8. Equal pay for work of equal value is now the law for all employers in the federal jurisdiction and Quebec. In Manitoba, Nova Scotia, Ontario, Prince Edward Island, and the Yukon, equal pay for work of equal value laws are also in force but they do not provide blanket coverage; principally they bind governments and some other public sector employers. See chart, "Scope and nature of government Pay Equity initiatives across Canada", in *Equality at Work*, vol. 1, no. 1 (April 1989). Equal pay for the same or similar work is still the law in all other jurisdictions and sectors.
9. Constance Backhouse made this comment in an interview with *The Globe and Mail*, 20 August 1988. She was explaining reactions to the voluntary affirmative action program at the University of Western Ontario.
10. *Supra*, note 7 at 40.
11. In "Making Sex Equality Real", *supra*, note 7 at 37-43, Catharine MacKinnon asks and answers the question: "What is an equality question, a question of?" She argues that equality is generally thought of as a question of sameness and difference, when, in fact, it is a question of dominance and subordination.

12. See Women's Legal Education and Action Fund factum for *Canadian Newspapers Co. v. A.G. Canada* (1988), [1989] 2 S.C.R. 122.
13. See E.A. Sheehy, *Personal Autonomy and the Criminal Law: Emerging Issues for Women* (Ottawa: Canadian Advisory Council on the Status of Women, 1987); C.A. MacKinnon, "Making Sex Equality Real", *supra*, note 7; C.A. MacKinnon, "Difference and Dominance" in C.A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987) at 32-45.
14. (1982), 137 D.L.R. (3d) 759 (Sask. Q.B.), rev'd (1985), 18 D.L.R. (4th) 93 (Sask. C.A.) [hereinafter *Huck*]. This ruling was subsequently reversed by the Saskatchewan Court of Appeal, which found that *Huck* was discriminated against and ruled that simply providing a disabled person with the same treatment as a non-disabled person did not fulfil the requirements of *The Saskatchewan Human Rights Code*.
15. D. Sobsey, "Sexual Offenses and Disabled Victims: Research and Practical Implications", *Vis-à-Vis*, Winter 1988, vol. 6, no. 4 at 1; J. Ridington, *Beating the "odds": Violence and Women* (Vancouver: D.A.W.N. Canada, March 1989). Contact D.A.W.N. Canada (c/o Joan Meister, 776 East Georgia St., Vancouver, British Columbia V6A 2A3) for further information; A. D'Aubin, *Disabled Women Issues: A COPOH Discussion Paper* (Winnipeg: Coalition of Provincial Organizations of the Handicapped, 1986) at 22.
16. It should not surprise us that the theory of formal equality is endorsed by the American Enterprise Institute for Public Policy Research and the Fraser Institute. These ultra-conservative think tanks have provided government and business with rationales for reducing or eliminating benefits and services to disadvantaged Americans and Canadians. They have accurately identified formal equality as the definition of equality that leaves the status quo intact and protects the advantages of those who are already privileged. See W.E. Black and M.A. Walker, eds., *Discrimination, Affirmative Action, and Equal Opportunity: An Economic Analysis and Social Perspective* (Vancouver: Fraser Institute, 1982), and Thomas Sowell, *Affirmative Action Reconsidered: Was It Necessary in Academia?* (Washington, D.C.: American Enterprise Institute for Public Policy Research, 1975).
17. One of the most trenchant criticisms can be found in an article by Peter Westen, "The Empty Idea of Equality" (1982) 95 *Harvard Law Review* 537.
18. See Cameron, J.A. in *Reference Re French Language Rights of Accused in Saskatchewan Criminal Proceedings* (1987), [1987] 5 W.W.R. 577 at 600 (Sask. C.A.). See also Mark Andrews, *supra*, note 2.
19. (1980), [1980] 2 S.C.R. 370.
20. Dickson, C.J.C. of the Supreme Court of Canada is also frequently cited on this point. He is quoted from *R. v. Big M Drug Mart* (1985), [1985] 1 S.C.R. 295 at 347, a Charter case dealing with freedom of religion, saying:

The equality necessary to support religious freedom does not require identical treatment of all religions. In fact, the interests of true equality may well require differentiation in treatment.

The courts cite Dickson, C.J.C. to support the thesis that, despite the rule of law and equality protections, laws need not be universal in their application. They wish to

narrow the task of review of governmental actions by the courts. However, in our view, Dickson, C.J.C. was stating the human rights principle applied in *Ontario Human Rights Commission v. Simpsons-Sears* (1985), [1985] 2 S.C.R. 536 and *Huck, supra*, note 14, that is, that the same treatment does not always produce equality; sometimes different treatment is necessary to produce an equal result.

21. *Supra*, note 19 at 406. For other statements of this right of the legislatures to differentiate amongst groups without running afoul of equality guarantees, see *A.G. Newfoundland v. Newfoundland and Labrador Housing Corp.* (1987), 62 Nfld. & P.E.I.R. 269 at 277 (Nfld. C.A.); *Mark Andrews, supra*, note 2 at 248; and the dissenting judgement of Howland and Robins, J.J.A. in *Reference Re An Act to amend the Education Act* (1986), 25 D.L.R. (4th) 1 at 7-51 (Ont. C.A.).
22. (1985), 51 O.R. (2d) 745 at 765, quoting Tussman and tenBroek, "The Equal Protection of the Laws", 37 *Cal. L. Rev.* 341 (1948) at 344.
23. (1986), 14 O.A.C. 318 at 324, quoting Monroe H. Freedman, *Equality in the Administration of Criminal Justice*, *Nomos IX* (1967) 250 at 253-254.
24. See *Reference Re An Act to amend the Education Act, supra*, note 21 at 7-51. See also *Re Blainey and Ontario Hockey Association* (1986), 54 O.R. (2d) 513 (C.A.); *Bregman v. A.G. Canada* (1986), 57 O.R. (2d) 409 (C.A.); *Century 21 Ramos Realty Inc. v. R.* (1987), 41 D.T.C. 5158 (Ont. C.A.); *R. v. Ertel, supra*, note 2; *R. v. Turpin* (1987), 22 O.A.C. 261 (C.A.); *R. v. S. (Sheldon), supra*, note 2.
25. *Supra*, note 2.
26. *Supra*, note 24.
27. *Supra*, note 2.
28. *Ibid.* at 303.
29. For an excellent discussion of the similarly situate test as articulated by the Ontario Court of Appeal, see M.P. Lepofsky and H. Schwartz, "An Erroneous Approach to the Charter's Equality Guarantee: *R. v. Ertel*" (1988) *Can. Bar Rev.* 115. For comment on the confusion regarding what a litigant must prove in order to be considered similarly situated, see p. 121.
30. (1986), [1987] 1 W.W.R. 427 (B.C.S.C.).
31. *Ibid.* at 437.
32. *Janzen and Platy Enterprises* (1987), 43 Man. R. (2d) 293 (C.A.) [hereinafter *Janzen*]; *Brooks v. Canada Safeway Ltd.* (1986), 42 Man. R. (2d) 27 (C.A.) [hereinafter *Brooks*].
On appeal to the Supreme Court of Canada (hearing 5 June 1988, decision reserved), it was argued by the Women's Legal Education and Action Fund (LEAF), as an intervenor, that the guarantees of equal protection and equal benefit of the law require that sexual harassment and discrimination because of pregnancy be covered by prohibitions against sex discrimination. [Editor's Note: The Supreme Court of Canada reversed the ruling of the Manitoba Court of Appeal in these cases, in a judgement released on 4 May 1989.]

33. *Janzen, ibid.*

34. S.M. 1974, c. 65, C.C.S.M., c. H175.

35. *Brooks, supra*, note 32.

36. (1978), [1979] 1 S.C.R. 183. See Chapter One for discussion of this case.

37. Twaddle, J. sets out the rationale for the *Janzen* decision, *supra*, note 32 at paras. 136 and 137. He also sheds light on the Court's ruling in *Brooks, supra*, note 32. He says:

Where the conduct of an employer is directed at some but not all persons of one category, it must not be assumed that membership of the category is the reason for the distinction having been made. The distinction may have been based upon another factor. Thus in *Bliss v. A.G. Canada* (1978), 92 D.L.R. (3d) 417 it was held that statutory conditions applicable only to pregnant women did not discriminate against them as women. Ritchie J., delivering the judgment of the Court, adopted the reasons for the judgment of the Federal Court of Appeal [77 D.L.R. (3d) 609] in which Pratte J., for the Court, said at 613:

"Assuming the respondent to have been 'discriminated against', it would not have been by reason of her sex. Section 46 applies to pregnant women, it has no application to women who are not pregnant, and it has no application, of course, to men. If section 46 treats unemployed pregnant women differently from other unemployed persons, be they male or female, it is, it seems to me, because they are pregnant and not because they are women."

The gender of a woman is unquestionably a factor in most cases of sexual harassment. If she were not a woman the harassment would not have occurred. That, however, is not decisive. Only a woman can become pregnant, but that does not mean that she becomes pregnant because she is a woman. We are concerned with the effective cause of the harassment, be it a random selection, the conduct, or a particular characteristic of the victim, a wish on the part of the aggressor to discourage women from seeking or continuing in a position of employment or a contempt for women generally. Only in the last two instances is the harassment a manifestation of discrimination.

38. (1986), 56 O.R. (2d) 649 (H.C.).

39. R.S.O. 1980, c. 302.

40. Appeal from this decision was abandoned and the main action was discontinued because of the death of the plaintiff.

41. (1986), 57 O.R. (2d) 441 (H.C.).

42. R.S.O. 1980, c. 406.

43. *Supra*, note 41 at 444.

44. (1986), [1986] 4 W.W.R. 154 (Alta. Q.B.).
45. (1987), [1987] 4 W.W.R. 549 (Alta. Q.B.).
46. While the text of the judgement in *Singh v. Dura*, *supra*, note 44, ignores the arguments regarding discrimination between rich and poor plaintiffs, these arguments were indirectly before the courts since all four plaintiffs relied on *Kask v. Shimizu*, *supra*, note 41.
47. (1986), 65 N.R. 62 (F.C.A.).
48. *Ibid.* at 64.
49. 1973, [1974] S.C.R. 1349.
50. R.S.C. 1970, c. I-6.
51. See Dale Gibson on this point in "Canadian Equality Jurisprudence: Year One" in S.L. Martin and K.E. Mahoney, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) at 134-135.
52. *Supra*, note 2.
53. *Supra*, note 2.
54. *Ibid.* at 303.
55. A preferred indictment is a means by which an Attorney General or a judge can bring a charge directly against an accused without a preliminary hearing, or after a preliminary hearing has been held and the accused has been discharged.

The section of the *Criminal Code* at issue in this case is s. 507(3) which provides:

Notwithstanding anything in this section, where

- (a) a preliminary inquiry has not been held, or
- (b) a preliminary inquiry has been held and the accused has been discharged,

an indictment under subsection (1) shall not be preferred except with the written consent of a judge of the court, or by the Attorney General.

It has been reenacted as s. 577 by the *Criminal Law Amendment Act*, 1985, R.S.C., c. 27, s. 115:

In any prosecution,

- (a) where a preliminary inquiry has not been held, an indictment shall not be preferred, or
- (b) where a preliminary inquiry has been held and the accused has been discharged, an indictment shall not be preferred or a new information shall not be laid

before any court without,

- (c) where the prosecution is conducted by the Attorney General or the Attorney General intervenes in the prosecution, the personal

consent in writing of the Attorney General or Deputy Attorney General, or

- (d) where the prosecution is conducted by a prosecutor other than the Attorney General and the Attorney General does not intervene in the prosecution, the written order of a judge of that court.

56. See *supra*, note 29 at 123 and 126.

57. *Supra*, note 41.

58. *Supra*, note 45.

59. *Criminal Code*, R.S., c. C-34, s. 255(5).

60. *Ibid.*, s. 254.

61. S.C. 1980-81-82-83, c. 110.

62. There are many other lines of cases and individual cases which could be used to illustrate the slipperiness of the similarly situate test. These are selected from many possible examples.

63. (1986), 57 O.R. (2d) 412 (C.A.).

64. *Ibid.* at 436-437.

65. See, for example, *R. v. Britton* (1986), 17 W.C.B. 346 (Ont. Dist. Ct.), *R. v. Chiasson* (1986), 16 W.C.B. 159 (Ont. Prov. Ct.), *R. v. Dennehy* (1986), 26 C.C.C. (3d) 339 (Y.T. Terr. Ct.), *R. v. Farnham* (1986), 52 Sask. R. 188 (Sask. Q.B.), *R. v. Frohman* (1987), 19 O.A.C. 180 (Ont. C.A.), *R. v. Hardiman* (1987), 78 N.S.R. (2d) 55 (N.S.S.C. (A.D.)), *R. v. Hardy* [1987] P.E.I.J. No. 88 (P.E.I.C.A.), *R. v. Hodgson* (1987) 1 W.C.B. (2d) 112 (Ont. Prov. Ct.), *R. v. Kruper* (1986), [1986] 5 W.W.R. 274 (Alta. Prov. Ct.), *R. v. M.C.O.* (1986), 16 W.C.B. 124 (Ont. Dist. Ct.), *R. v. McPherson* (1986), [1986] 6 W.W.R. 366 (Alta. Q.B.), *R. v. Musselman* (1987), 55 Sask. R. 233 (Sask. Q.B.), *R. v. Notarianni* (1986), 16 W.C.B. 67 (Ont. Prov. Ct.), *R. v. Russell* (1987), 78 N.S.R. (2d) 66 (N.S.S.C. (A.D.)), *R. v. Wiklun* (1987), [1987] 2 W.C.B. (2d) 246 (Sask. Q.B.).

66. (1985), 51 O.R. (2d) 745 (C.A.). For other decisions containing similar reasoning, see: *R. v. A.M.* (1985), 47 C.R. (3d) 355 (Ont. C.A.), *R. v. L.S.* (1985), 43 Sask. R. 146 (Sask. C.A.), *R. v. Lawrence* (1985), 72 N.S.R. (2d) 21 (N.S.S.C. (A.D.)), *R. v. R.D.L.* (1985), 47 C.R. (3d) 378 (Ont. C.A.), *R. v. Starblanket* (1985), [1985] 6 W.W.R. 673 (Sask. C.A.).

67. *Re McDonald and the Queen* (1985), 51 O.R. (2d) 745 (C.A.) at 768.

68. *Ibid.*

69. Those caught in the phase-in period of the *Young Offenders Act*, *supra*, note 61, did not get this benefit from s. 15, nor from s. 11(i). S. 11(i) of the Charter provides that:

Any person charged with an offence has the right . . .

- (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

In *R. v. R.D.L.*, (1985) 47 C.R. (3d) 378, the Ontario Court of Appeal decided that s. 11(i) of the Charter did not apply because the 16-year-old accused had been properly tried under the *Criminal Code*, and the punishment for the charge under the *Criminal Code* had not varied. In addition, the accused was not a "young person" when tried.

70. In addition to its other problems this decision blurs the distinction between s. 15 and s. 1. It runs s. 1 arguments into s. 15 and uses them as a justification for finding that the classes are not similarly situated. The Court is clearly concerned by the administrative problems it foresees would be created if s. 15 were found to be violated. Parliament intended to have a phase-in period which ended before the Charter came into effect, the Court says, and it would be unreasonable to decide that Parliament should have provided that all unfinished proceedings be terminated and started again under the *Young Offenders Act*. These s. 1 arguments are used to justify a finding that the classes are not comparable, even though they are not relevant to that determination.
71. (1988), 9 C.H.R.R. D/5089 (Ont. H.C.).
72. R.S.O. 1980, c. 197.
73. *Supra*, note 71 at D/5091.
74. (1986), 53 O.R. (2d) 209 (Ont. C.A.).
75. (1986), [1986] 4 W.W.R. 401 (B.C.C.A.).
76. The same scheme also applies to those found unfit to stand trial. Ss. 543 and 465(3) of the *Criminal Code* require the court to order that a person found unfit to stand trial be kept in strict custody until the pleasure of the Lieutenant Governor is known. That this provision is capable of producing a tragic unfairness is illustrated by the circumstance of Emerson Bonnar, a 19-year-old New Brunswick man charged with attempted robbery in 1964. On his first appearance in court, Bonnar stated that he did not need a lawyer, and entered a plea of guilty because he wanted to "get it over with". As part of a pre-sentence report, the Crown presented evidence through a psychiatrist to the effect that Bonnar was "mentally retarded — moron level", and not "able to instruct counsel or give a coherent and logical story which would be acceptable to the court." The evidence persuaded the Court to strike the guilty plea, and make a declaration that Bonnar was unfit to stand trial. And, pursuant to the requirements of the *Criminal Code*, Bonnar was placed under Lieutenant Governor's warrant, to be detained indefinitely at the pleasure of the Lieutenant Governor. After 16 years of detention, and even then only because of efforts of the CBC Ombudsman television program and the Canadian Association for the Mentally Retarded, Bonnar was released.
77. In 1976, the Law Reform Commission of Canada tabled a report entitled *Report to Parliament on Mental Disorder in the Criminal Process* (Ottawa: Information Canada, 1976). It recommended major reforms in this area, including that the rights of the

accused be spelled out so as to guarantee procedural fairness and to ensure that the criminal law would involve the minimum possible interference with liberty consistent with public safety. In 1981, the Special House of Commons Committee on the Disabled and the Handicapped recommended in *Obstacles* (Ottawa: Supply and Services Canada, 1981) that the *Criminal Code* be amended to replace Lieutenant Governor's warrants, define the rights of mentally ill and mentally handicapped persons, and establish procedural fairness for the accused at all stages of the criminal process. In 1983, the federal Department of Justice published a draft report, with recommendations, of the Department's Mental Disorder Project, which was finalized in September 1985. Also in 1985, the Boyer Committee, in *Equality for All: Report of the Parliamentary Committee on Equality Rights* (Ottawa: Queen's Printer, 1985), urged the Government of Canada to bring forward amendments to provisions of the *Criminal Code* including s. 542(2) which, the Committee concluded, deny people with mental disabilities the equal protection and equal benefit of the law contrary to s. 15 of the Charter. Although the federal government introduced amendments to the *Criminal Code* in June 1986 which would address some of the concerns of mentally disabled people, it has failed to move these amendments through the legislative process.

78. *Supra*, note 75 at 410.

79. *Ibid.* at 422.

80. *Supra*, note 74 at 422-423.

81. In *Reference Re Procedures and the Mental Health Act*, (1984), 5 D.L.R. (4th) 577, the Prince Edward Island Supreme Court *in banco* reasons that while the provisions of the *Mental Health Act*, R.S.P.E.I. 1974, c. M-9 may violate s. 15 of the Charter, they are surely reasonable limits on the equality rights of mentally disabled persons. The intent of the Act is benign, the Court says, and the thrust of the Act is to provide safety, support, and succour to those with mental disabilities. The Court also finds historical support for treating mentally disabled persons differently. It says at 589-590:

The point to be made here is that from the earliest days of English legal history those originally termed "lunatics", now more euphemistically "persons suffering from a mental disorder", were treated as a separate class, requiring and deserving of special care and consideration by the Crown itself, but, by reason of their infirmity, subject to certain restrictions as to their freedom of conduct. Surely, it cannot be argued in the light of historical precedent, continuing to this day, that such restrictions are not "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (Charter, section 1).

When the court upholds a challenged system on the basis that it is well-intentioned and part of our legal tradition, the circle of inequality seems impossible to break. Reasoning like this gives one a whiff of the social compact among the class of judges and legislators. There is a solidarity among them which does not need to be declared.

82. (1985), 52 O.R. (2d) 353 (C.A.). This decision was overturned by the Supreme Court of Canada (1988), [1988] 1 S.C.R. 30 [hereinafter *Morgentaler*].

83. *Ibid.* at 395 (C.A.).

84. See Wilson, J.'s judgement in the Supreme Court of Canada's decision in *Morgentaler*, *ibid.* at 161. See also "Morgentaler: An Unendorsed Result" in S. Persky and S. Day, eds., *Morgentaler* (Vancouver: New Star Books, 1988), for further discussion of these issues. The Supreme Court of Canada did not deal with the equality issue in its decision in the *Morgentaler* case. It found that s. 251 violated s. 7 of the Charter because it deprived women of their security of the person.
85. *Supra*, note 2.
86. See T.W. Wakeling and G.D. Chipeur, "An Analysis of Section 15 of the Charter After the First Two Years or How Section 15 Has Survived the Terrible Twos" (1987) 25 *Alta. L. Rev.* 407.
87. *Supra*, note 2 at 248.
88. *Ibid.* at 252-253.
89. (1986), [1986] 1 S.C.R. 103.
90. *Ibid.* at 134.
91. (1986), 12 C.P.R. (3d) 385.
92. *Ibid.* at 393.
93. See *Rodger v. Canadian National Railways* (1985) 6 C.H.R.R. D/2899 (Trib.) at para. 23643. See also *Ontario Human Rights Commission v. Borough of Etobicoke* (1982), [1982] 1 S.C.R. 202 at 208, where McIntyre, J. speaking for the Supreme Court of Canada says:

Once a complainant has established before a board of inquiry a *prima facie* case of discrimination, in this case proof of a mandatory retirement at age sixty as a condition of employment, he is entitled to relief in the absence of justification by the employer. The only justification which can avail the employer in the case at bar, is the proof, the burden of which lies upon him, that such compulsory retirement is a *bona fide* occupational qualification and requirement for the employment concerned.

In *Gay Alliance Towards Equality v. Vancouver Sun* (1979), [1979] 2 S.C.R. 435 at 461, Dickson, J. wrote in his dissent that:

... the word unless in the phrase "unless reasonable cause exists" places the onus of establishing reasonable cause upon the person against whom the complaint is brought.

(In the 1973 B.C. *Human Rights Code*, discrimination was prohibited "unless reasonable cause exists". It was the interpretation of this phrase which was at issue in the *Gay Alliance* case. The structure of s. 1 is not very different since it guarantees rights subject to demonstrably justifiable limits, as the *Human Rights Code* language guaranteed freedom from discrimination unless reasonable cause exists.)

See also *Dhaliwal v. B.C. Timber Ltd.* (1983), 4 C.H.R.R. D/1520 at paras. 13355-13365 for discussion of these cases and the issue of the shift in burden of proof from complainant to respondent.

94. See M.D. Lepofsky and H. Schwartz, "An Erroneous Approach to the Charter's Equality Guarantee", *supra*, note 29 at 125. These comments regarding the test developed by the Ontario Court of Appeal in *R. v. Ertel*, *supra*, note 2 are equally applicable to the B.C. Court of Appeal's test in *Mark Andrews*, *supra*, note 2.
95. *Mark Andrews*, *supra*, note 2 at 253.
96. M.D. Lepofsky and H. Schwartz, "An Erroneous Approach to the Charter's Equality Guarantee", *supra*, note 29.
97. See also M. Eberts, "Risks of Equality Litigation" in *Equality and Judicial Neutrality*, *supra*, note 51 at 104.
98. In the *Mark Andrews* case, *supra*, note 2, the Court examines whether Canadian citizenship for lawyers is required to accomplish the government's purposes of ensuring familiarity with Canadian institutions and customs, ensuring a commitment to Canadian society, and guaranteeing that those who play a fundamental role in the Canadian governmental system are citizens.
99. Remember also that an examination of purpose is inherent in the similarly situate test, since the *Ertel* court says that the determination of whether two classes are similarly situated requires examination of whether they are the same or different with respect to the **purposes** of the impugned law; *R. v. Ertel*, *supra*, note 2 at 272.
100. *Supra*, note 75.
101. *Supra*, note 19.
102. *Ibid.* at 420.
103. *Supra*, note 75 at 420.
104. See *Ontario Human Rights Commission v. Simpsons-Sears*, *supra*, note 20, and *Huck*, *supra*, note 14.
105. For other criticisms of the *Mark Andrews* decision, *supra*, note 1, see T.W. Wakeling and G.D. Chipeur, "An Analysis of Section 15 of the Charter After the First Two Years or How Section 15 Has Survived the Terrible Twos", *supra*, note 86 at 415 and following, and M. Eberts, "The Risks of Equality Litigation" in *Equality and Judicial Neutrality*, *supra*, note 51 at 103-104. Dale Gibson approves of the *Mark Andrews* decision in "Canadian Equality Jurisprudence: Year One", *ibid.* at 140-141.
106. Lepofsky finds that the *Ertel* court borrowed the reasonableness test in *Mark Andrews* but adopted it out of context, and he finds no difference between the two tests because of slightly different words used in them. See M.D. Lepofsky and H. Schwartz, *supra*, note 29 at 124.
107. *R. v. Ertel*, *supra*, note 2 at 272-273.
108. *Supra*, note 2 at 303.
109. *Ibid.* at 304.

110. *McKinney v. University of Guelph*, *supra*, note 2 at 40.

111. (1986), 56 O.R. (2d) 636 at 646.

112. See M.D. Lepofsky and H. Schwartz, *supra*, note 29 at 127.



Chapter Eight

SUBSTANTIVE EQUALITY

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Introduction

The Supreme Court of Canada has stated that the proper approach to interpreting the rights and freedoms guaranteed by the Charter is a purposive and generous one, not a narrow or legalistic one.¹ A purposive and generous approach to Charter equality rights would have significant implications for the interpretation of section 15.

In this chapter we will reiterate that a primary purpose of section 15 is to provide substantive equality that is, to assist disadvantaged groups such as women, overcome their inequality of condition. We will argue that substantive inequality problems require the application of a substantive model of equality and that the goal of realizing the Charter's commitment to equality for disadvantaged groups makes it necessary to separate substantive equality claims from other types of equality claims.

Purpose of Section 15

The history and language of both sections 15 and 28 demonstrate that a primary purpose of the Charter's equality guarantees is to assist disadvantaged groups such as women in overcoming inequality. The evidence to support this assertion was advanced in Chapter Two where we showed that section 15 is rooted, in part, in human rights initiatives developed over several decades, both internationally and domestically, in response to society's gradual recognition of the problem of discrimination.

These initiatives are aimed at providing protections against discrimination for persons who have been disadvantaged by discriminatory attitudes, practices, and rules; they are premised on the recognition of the inherent dignity and worth of the person. Over the years, Canadian statutory human rights protections have been broadened and strengthened by legislatures and courts. Canada now has a substantial body of human rights decisions; they constitute a valuable source of interpretive assistance in relation to section 15.² The Supreme Court of Canada, in recent years especially, has recognized the social and legal importance of statutory human rights protections. The Court has held that human rights legislation is of a special "quasi-constitutional" character and that it prevails over other ordinary statutes that may conflict with it.³ The special nature and purpose of human rights legislation, the Court has determined, requires a focus on the effects of discrimination, as well as effective and comprehensive remedies.⁴

Because section 15 is a fully constitutional expression of human rights, and equality is thereby made a fundamental commitment of Canadian society, the values embodied by section 15 should be accorded an even greater level of recognition than human rights protections have been in the past.

The Charter also reflects a commitment to recognizing group interests in the attainment of equality and the preservation of diversity. Because a number of sections recognize that some groups need special protections to guarantee their equality in Canadian society, it is our view that the idea of group interests is necessarily inherent in section 15 as well.⁵ Further, the Supreme Court of Canada has recognized the

importance of promoting the equality of particular groups,⁶ of providing a voice in the courts and a remedy for those excluded from equal and effective democratic participation in our society,⁷ and of not permitting the Charter to be used to cut back legislative measures designed for the advancement of less advantaged groups.⁸

The other historical origin of section 15 is the rule of law and section 1(b) of the *Canadian Bill of Rights*. However, section 15 of the Charter is not a mere restatement of section 1(b) of the Bill. Early drafts of section 15, which were similar in wording to the equality guarantee of the Bill, were rejected specifically to overcome the inadequacies of interpretations that had been rendered under the Bill. In particular, the language of section 15 was chosen to increase equality protections for women and other disadvantaged groups. Section 28 was added to reinforce the guarantee of equality to women. In summary, the equality rights guarantee in section 15 was clearly intended to go beyond the guarantee of equality "before the law" provided by section 1(b) of the *Canadian Bill of Rights* and clearly intended to promote the substantive equality of disadvantaged groups.⁹

In spite of this, many equality rights decisions reflect the view that the only purpose of section 15 is to restate the "equality before the law" element of the rule of law. In the main, Canadians are being treated to nothing more than the *Canadian Bill of Rights* in new clothes. No court has undertaken a comprehensive analysis of the difference between men's sex equality claims and women's sex equality claims, that is, the difference between claims involving entrenched disadvantage and claims involving disadvantageous distinctions in isolated circumstances.

We believe that the "equality before the law" approach must be rejected as the sole meaning of section 15 because it is clearly inadequate for women and other disadvantaged groups. Given this, the question that arises is how the substantive content of the equality guarantee can be brought to life. In large measure, this is a question of education for Canadian judges and of commitment from them to the task of assisting disadvantaged groups.

As well, a number of interpretive issues flow from this crucial question. For instance, is it necessary to differentiate equality claims based on substantive inequality from other equality claims? If it is — and assuming that only groups that are substantively unequal (disadvantaged) are entitled to substantive equality rights — what are the Charter equality rights, if any, of persons who are not members of disadvantaged groups? Phrased another way, do persons who are not members of traditionally disadvantaged groups have any section 15 rights, or does section 15 exist strictly for the benefit of women and other groups disadvantaged by such factors as disability, race, or colour?

It is helpful to consider these interpretive issues in light of the conflicting positions put before the Supreme Court of Canada in an actual case, the *Mark Andrews*¹⁰ case, which is the first section 15 case to be decided by the highest court. Andrews' equality challenge was based on citizenship, a ground that is not enumerated in section 15. He made the challenge after he was refused membership in the Law Society of British Columbia because he was not a Canadian citizen.

In *Mark Andrews*, there were three parties — Andrews, the Law Society, and the Attorney General for British Columbia, as well as numerous intervenors. They put diverse positions before the Court concerning the meaning of equality and the identity of its intended beneficiaries. Essentially there were four positions.

First, on behalf of the appellant Mark Andrews, it was argued that equality is an individual right that protects everyone against unreasonable legislative classifications.

Second, the interpretive position of the Law Society of British Columbia, a respondent in the appeal, was not that different from Andrews, except the Law Society tried to dissuade the Court from striking down the citizenship rule by heavily emphasizing the democratic obligation of courts to defer to the will of governments. The Law Society called for a revival of the "valid federal objective" test enunciated in *MacKay*¹¹ under the *Canadian Bill of Rights*.

Third, the Attorney General for British Columbia, supported by a majority of other Attorneys General who intervened in the appeal, argued that section 15 confers individual rights but they do not apply to all persons. The argument was that section 15 rights apply only to enumerated grounds or grounds that are akin (analogous) to those enumerated. The central rationale of the Attorneys General for this approach was that unlimited reception of all claims based on any legislative distinction will result in an unintended and unworkable expansion of the role of the judiciary, from guardian of the *Constitution Act* to overseer of the wisdom of all government activity.

Fourth, LEAF, an intervenor, argued that section 15 confers both individual and group rights, equality in process to all individuals, but substantive equality rights only to disadvantaged groups. The Coalition of Provincial Organizations of the Handicapped (COPHO), another intervenor, argued that section 15 confers both individual and group rights. COPHO's position was that section 15 assures all Canadians of formal equality, but substantive equality rights only to disadvantaged groups. LEAF and COPHO, who supported the view that a line must be drawn between claims based on substantive equality and other equality claims, reasoned that undifferentiated reception of claims based on any legislative distinction will dilute the effectiveness of the guarantee of substantive equality. It should be noted that LEAF and COPHO expressed no opinion about what a desirable outcome for the case would be. Their main interest in the case was to ensure that equality was not given too narrow an interpretation, based on the limited facts and arguments in this early section 15 case.

We agree that it will be necessary for substantive equality rights claims to be separated from other equality rights claims. The goal of assisting disadvantaged groups such as women to overcome inequality cannot be achieved by rectifying situations of individual unfairness according to a formal equality model.¹² Further, the goal is threatened by the claims of advantaged groups asserting their right to perpetuate their dominance over disadvantaged groups.

These terms, "individual" and "advantaged", may require explanation. By individual equality rights claims, we mean challenges by persons who are not members of disadvantaged groups to provisions such as court rules requiring security for costs

from out-of-province litigants and drunk-driving laws that vary from province to province. Individual equality rights claims are claims based on differential treatment, brought by or on behalf of persons who, while they may be disadvantaged by a particular impugned legislative distinction, are not pervasively and systemically disadvantaged in the way that women, for example, are.

By claims of advantaged groups we mean claims such as those of men versus women. Although individual men may be disadvantaged by isolated legislative provisions, some of which have been designed to assist women in overcoming inequality, in general, men are clearly not disadvantaged relative to women. Sex inequality is a problem of women's disadvantage relative to men, not the other way around.¹³ If the substantive disadvantage of women is to be addressed, this basic fact must be recognized in a section 15 equality model.

If equality is defined as an individual right that protects everyone against unreasonable legislative classifications, the Charter's commitment to substantive equality is erased. Such a definition mandates same treatment for all, and it ignores the special needs of disadvantaged groups. Therefore, the critical issues in equality litigation are these: establishing an equality model that recognizes substantive inequality; accepting that substantive equality claims must be assessed differently from other equality claims; and developing criteria for determining whether particular claims are based on substantive inequality.

A Substantive Equality Model

We recommend that substantive equality claims be separated from other equality claims because disadvantaged groups need legislative measures and interpretative approaches not required by members of groups that are not disadvantaged. In essence, substantive inequality problems require the application of a substantive model of equality, not a formal model of equality.¹⁴

A substantive equality model differs from a formal model of equality in important respects. Whereas a formal model of equality is concerned with like treatment of like individuals, subject to the power of governments to make responsible distinctions, a court applying a substantive model of equality would:

- focus on the problem of substantive inequality and not on sameness or difference of treatment;¹⁵
- appreciate that the interests of true equality may require differentiation in treatment;¹⁶ and
- reject reasonableness as a qualification on equality rights.

Human rights jurisprudence is a helpful stepping stone to the development of a substantive equality model.¹⁷

Focussing on the Problem of Women's Substantive Inequality

Let us reflect on how these principles might apply to a sex equality case. Focussing on the problem of substantive inequality means listening to women's descriptions of their experience of disadvantage. As Kathleen Lahey states:

Judges will have to begin to listen to women, to what they have to say — as witnesses, as experts, as lawyers — and they will have to ascribe as much validity and importance to that viewpoint as they do to the men's voices they are used to hearing.¹⁸

A substantive equality model does not permit women's equality claims to be dismissed just because women cannot prove that they are "similarly situated" to men or that there is a male analogue for everything women experience. There are few examples of court decisions in which women's inequality is acknowledged. The judgement of Justice Wilson in *Morgentaler*,¹⁹ which was not even decided on equality grounds, is an exception in this regard. Justice Wilson actually acknowledged women's experience of inequality. Whereas the Ontario Court of Appeal rejected *Morgentaler*'s Charter challenge, refusing to listen to the facts concerning the impact of the restrictive abortion law on women's lives, the Supreme Court of Canada did listen to the evidence and found the law unconstitutional.

Justice Wilson went furthest of all the justices towards focussing on abortion as an equality issue for women. She said:

... the history of the struggle for human rights from the eighteenth century on has been the history of men struggling to assert their dignity and common humanity against an overbearing state apparatus. The more recent struggle for women's rights has been a struggle to eliminate discrimination, to achieve a place for women in a man's world, to develop a set of legislative reforms in order to place women in the same position as men . . . It has **not** been a struggle to define the rights of women in relation to their special place in the societal structure and in relation to the biological distinction between the two sexes. Thus, women's needs and aspirations are only now being translated into protected rights. The right to reproduce or not to reproduce which is in issue in this case is one such right and is properly perceived as an integral part of modern woman's struggle to assert **her** dignity and worth as a human being.²⁰ (emphasis in original)

Focussing on the problem of women's substantive inequality has implications for the remedies granted by courts. A court applying a substantive equality model would not strike down legislation designed to help women. If confronted with legislation that excluded men unreasonably, a court applying a substantive equality model might extend the legislation to men, but it would not strike down the law. Similarly, a court applying a substantive equality model would not stop short of reading in legislative changes necessary to promote women's equality or fail to construct remedies that give equality rights their "full recognition and effect".²¹

Focussing on the problem of women's substantive inequality also entails recognizing that the equality guarantees apply to rules or practices that have discriminatory effects on women, even where those effects are unintentional or indirect. The question judges should be asking in equality rights cases is "whether the impugned law, policy or practice is operating to the detriment of women"²² or, stated another way, "whether the rule or practice that is being challenged contributes to the actual

inequality of women, and whether changing the rule or practice will actually produce an improvement in the specific material conditions of the specific woman or women before them."²³ Such an approach is remedial in orientation and not concerned with motive.

Differentiation in Treatment

A substantive equality model is concerned with equality of results for women as a group. Section 15(2) of the Charter specifically recognizes that the interests of equality may require differentiation in treatment. This is not limited to the narrow definition of affirmative action in the employment context. It means that governments and courts must do whatever is necessary to allow women to enjoy all of society's resources, benefits, and protection with equal dignity, respect, and opportunity. In a recent decision of the Supreme Court of Canada concerning the meaning of equality in the Quebec Charter, Justice Lamer said:

... [equality] does not mean that all candidates for a professional corporation have to be treated in the same way. Indeed, discrimination will sometimes result from equal treatment because special features that distinguish each group will then be disregarded.²⁴

Because of the systemic character of sex discrimination and women's unique reproductive capacity, the interests of women's equality require special treatment, such as maternity benefits provisions that will at times conflict with men's formal equality. It is suggested that, in order to make the guarantee of substantive sex equality meaningful, conflicts between men's claims to be treated the same as women and women's claims to equality of condition must be resolved in favour of women's claims to equality of condition.

Reasonable Qualifications on Equality Rights

Adopting a substantive equality model also has implications for the relationship between sections 15 and 1 of the Charter. A substantive equality model is based on the premise that the systematic subordination of women is no longer acceptable in our society. If, as we suggest, what should be discussed within the concept of substantive sex inequality really is systematic oppression of women by men, it is very difficult, if not impossible, to imagine a role for qualifications on the Charter's commitment to substantive sex equality. We cannot conceive of any demonstrable justification for perpetuating the subordination of women in a free and democratic society.

It also follows, all the more so, that unreasonableness should not be imported into the interpretation of sex equality itself. The very idea of reasonable subordination is inherently contradictory and offensive to the dignity and worth of women. This view is shared by Colleen Sheppard who states, "Section 1 should not allow society to justify the creation or perpetuation of sexual inequality."²⁵ As well, some justices of the Supreme Court of Canada have expressed the view that certain other Charter provisions should be absolute.²⁶

Recognizing Substantive Equality Claims

Enumerated Grounds

If a line is to be drawn between substantive equality rights claims and other claims, it must be possible to recognize claims based on substantive inequality. In claims based on the enumerated grounds of the Charter, the language of section 15 itself may be determinative. For example, in cases concerning the disability equality rights guarantees of section 15, the language of the enumerated grounds itself is determinative. In particular, section 15(2) makes it clear that persons with mental or physical disabilities constitute a disadvantaged group intended to benefit from the protection of section 15's guarantee of substantive equality. Other enumerated grounds such as sex, race, and religion are listed in a "neutral" way, leaving open the possibility of equality claims by advantaged groups such as men against women, or whites against Aboriginal people.

In most such cases, it will not be difficult to identify the group that is suffering from inequality. As LEAF said in *Mark Andrews*, there is widespread agreement that women and people of colour have been disadvantaged in Canadian society, to the point that a categorical determination can be made in these cases. There is no need for substantive equality to be extended to men on the basis of their sex, or to whites on the basis of their race. These groups already have substantive equality.

Concerning the disadvantaged position of women, LEAF said:

Widely acknowledged indices of second class citizenship which have led to the recognition that women are a disadvantaged group include women's unequal pay, allocation to disrespected work, demeaned physical characteristics; targeting for rape, domestic battery, sexual abuse as children and systematic sexual harassment; depersonalization, use in denigrating entertainment, and forced prostitution. For women, these abuses occur in an historical context characterized by disenfranchisement, preclusion from property ownership, exclusion from public life, and a sex-based poverty and devaluation of women's contributions in all spheres of social life which continue down to the present day.²⁷

Let us consider age: another enumerated ground that is expressed in neutral terms. Unlike the term disability, age does not reveal the particular ages of the groups intended to benefit from a substantive equality guarantee. However, the historical and contemporary record discloses that systemic inequality based on age is a problem for children and the elderly but not generally for people in the middle years of adulthood. Therefore, a categorical determination of disadvantage can be made concerning age. The effect of such a categorical determination would be to guarantee substantive equality to children and elderly persons, but not to other persons.

Unenumerated Grounds

In the proposed analysis, the question of group disadvantage arises also in relation to claims based on unenumerated grounds. It is settled law that the list of

grounds in section 15 is open-ended. The question is what grounds, in addition to the enumerated grounds, should be extended the protection of a substantive guarantee of equality. In *Mark Andrews*, LEAF suggested criteria to guide a factual inquiry into whether a category raises concerns of substantive inequality. In our opinion, these criteria would be of assistance to a court:

- whether and to what extent it is related to an enumerated ground (e.g., marital status and sex, citizenship and national origin);
- whether it is institutionalized throughout society so as to affect, in a systematic and cumulative way, dignity, respect, access to resources, physical security, credibility, membership in community or power;
- whether it has a social history of disempowerment, exploitation, and subordination to and by dominant interests.²⁸

Because the interest of substantive equality for disadvantaged groups may conflict with individual claims to same treatment, courts should exercise caution in finding substantive disadvantage based on local or contextual circumstances rather than on the basis of evidence of widespread systemic disadvantage. Contextual assessments of disadvantage need never be rendered in sex inequality cases because the evidence of women's categorical subordination by men is unequivocal.

However, in some cases involving unenumerated grounds, a determination of disadvantage may have to be made on a case-by-case basis, having regard to the context of the claim. This may be necessary in cases involving marital status; for example, while more laws favour married persons than non-married persons, some laws favour non-married over married persons. Often marital status is a proxy for either sex or minority sexual orientation, with the adverse impact of marital status discrimination falling on women, gay men, and lesbians. In these cases it makes no difference whether the claim of direct discrimination is based on being married or on not being married. Such claims can be dealt with as cases of substantive inequality based on sex or minority sexual orientation, whichever is applicable.

However, not all cases of marital status discrimination are related to sex or sexual orientation. For example, attribution rules under income tax laws governing transfers of income-earning property treat married persons more harshly than unmarried persons. When marital status claims are not related to sex or sexual orientation, a court may have to question whether married persons or non-married persons, if either, are a disadvantaged group. It may be that neither group is systematically disadvantaged and therefore would not be entitled to claim the benefit of the substantive equality guarantee.

Claims Not Based on Substantive Inequality

Let us return briefly to the question of what courts should do with claims that are not about substantive inequality. The argument of the Attorney General of British Columbia — that only claims based on enumerated and akin (analogous) grounds should trigger section 15 scrutiny, leaving other grounds with no section 15 protection — poses certain problems.

We agree that institutional constraints cannot be ignored in deciding what to do about section 15 claims that do not raise issues of group disadvantage. The Charter is increasing the workload of the courts significantly.²⁹ It is true that the courts will not be able to hear every potential claim based on a mere legislative distinction, and some line-drawing will be necessary.

However, the approach suggested by the Attorney General of British Columbia is not the answer. In particular, this approach has the shortcoming of failing to differentiate between claims of advantaged groups and claims of disadvantaged groups. For example, it does not differentiate between the sex equality claims of men and those of women. In essence, it presumes that enumerated and akin grounds denote individual rights but no substantive equality rights.

The argument that substantive equality is for disadvantaged groups and process rights remain for everyone else is in our opinion preferable, though not without its problems. The main problem with suggesting a distinction between claims based on process and those based on substance is that separating process from substance can be a questionable exercise, particularly where process and disadvantage intersect.

Theoretically, process rights could be defined as rights to equality in the administration and application of the law, as distinct from the content of the law. But when the definition is applied to real-life situations, confusion can result, because a process/substance distinction relates to the subject matter or interest at stake, while disadvantage relates to the status or identity of the persons affected by the rule or practice in question.

For example, potential difficulties can be imagined if a process/substance distinction were applied to analyse the insanity provisions of the *Criminal Code*. These provisions raise process issues because they establish a separate process for the disposition of certain cases, but they also raise substantive inequality issues for persons with mental disabilities in the criminal system. Persons with mental disabilities are widely recognized as a disadvantaged group in our society. One would not want the claims of mentally disabled persons in the criminal system to be accorded a lower standard of Charter protection because such claims were characterized as process rather than substance claims. Nor would one want the claims of such persons to be dismissed because they were not recognized as substantive equality claims. However, this is not a problem if process rights are recognized as important and a credible body of principles for adjudicating process rights cases can be developed.

Alternatively, the argument can be made that section 15 guarantees formal equality to all, but substantive equality to disadvantaged groups only. In this formulation, formal equality rights would entitle all persons to the same treatment based on the similarly situated test, but disadvantaged groups would be entitled to substantive equality. This position is not without its merits. It mandates a separate approach to substantive equality claims, without abandoning completely the concept of individual fairness, a concept incorporated in the language of section 15. Also, it does not require distinctions between process claims and substance claims, a distinction that can be difficult to make. As well, this latter approach suggests the

very attractive possibility of reconciling the claims of advantaged groups with the claims of disadvantaged groups. Advantaged groups such as men would be entitled to formal equality, subject to the substantive equality rights of women to measures designed to assist them in overcoming inequality.

This sounds like a reasonable proposition, but there are problems with it. First, it does not guarantee that courts will be able to reconcile formal equality claims and substantive equality claims, particularly in cases of distributive justice. What would it really mean to courts to be told that men have the right to be treated the same as women, but that women have the right to be treated in whatever way is necessary to overcome historical disadvantage? How would a court deciding the Nova Scotia *Reference Re Family Benefits Act* case apply this formula?³⁰ Perhaps the formula would make it easier to recognize the special benefits program as a legitimate means of assisting women as a disadvantaged group. But what about the individual single father (like Phillips) who challenges the legislation? Does his claim automatically fail because substantive equality trumps formal equality every time? Should his claim be dismissed because single mothers are a more disadvantaged group than single fathers? Or should benefits be extended to him because even though he is a member of the advantaged group, that is, men, he is also a member of a disadvantaged group, that is, poor persons?

In a sense, these hard questions have to be dealt with no matter what formula is selected because what has been raised is the spectre of competing substantive equality claims — groups of poor persons in competition for state benefits. Because of the poverty factor in this scenario, we think that benefits should be extended to poor fathers, but that men *qua* men should not be permitted to bring equality claims based on inequality of condition. We think that Phillips should have brought his challenge on the basis of poverty, not on the basis of sex. We do not reach these conclusions on the basis of a distinction between formal/substantive equality, but rather on the basis of a group advantage/disadvantage distinction.

As our study of equality decisions has shown, formal equality has no content. While it has the effect of perpetuating the advantage of the already advantaged, its analysis is concerned only with superficial comparisons disconnected from the real problems of inequality that lie beneath. Formal equality is an empty idea.³¹ If formal equality is to be a right, then courts will have to breathe meaning into it. In other words, they will have to **create** the right.

For example, the courts could decide to develop rule of law concepts, such as access to the courts, as "formal" section 15 equality rights. Then, formal equality would have content. If this were done, there would be no real difference between the idea of formal equality for all and the idea of process rights for all. It is our suggestion, however, that the terminology of "formal equality" be abandoned because it is in such disrepute. And, no matter what, it is important that equality rights concepts be developed in ways that have meaning for disadvantaged groups. This study has shown, for instance, that access to the courts entails much more than having open doors on courthouses. Access to the courts costs money, which disadvantaged groups lack.

It is essential that the courts be available as guardians of Charter rights for those excluded groups that need it the most.³² Our proposal is that section 15 should be available for substantive equality claims by disadvantaged groups, and that members of advantaged groups who are disadvantaged only by virtue of their individual circumstances ought not to be able to bring substantive equality claims. This is based on three considerations:

- members of advantaged groups are by definition not substantively disadvantaged;
- the democratic process is more accessible to members of advantaged groups; and
- the resources of both disadvantaged groups and the courts are limited.

This would not mean that members of advantaged groups would be completely without equality rights, however. The process rights component of section 15 should be recognized and available to all. But it should be developed in a limited way to protect rights traditionally associated with the rule of law, such as access to the courts.

It does not follow, however, that claims concerned with equality in the process or administration of the law can be dealt with as though they were second-class claims. It would not be acceptable for the courts to carry on as they have been, dealing with process claims as though they simply required that "likes be treated alike". On the contrary, we think it essential that the goal of substantive equality be pursued in relation to process rights, so that claims such as Donald Marshall's, based on race discrimination in the processes of the criminal law system, would receive very serious consideration. In the formulation we envision, the rights of all persons to fairness in the process or administration of the law would receive a high level of judicial protection.

Conclusion

The formal model of equality, as well as the associated analytic tools the courts have developed to go with it, are inadequate even to address traditional rule of law problems concerning fairness in the legal process. Even in these cases, courts will have to work to overcome the fact that their decision-making has been highly discretionary, not based on reliable principles, and therefore unpredictable.

The attachment of our society to the rule of law is deeply ingrained. We could not avoid it even if it were not entrenched in the Charter. It is not the only idea of equality entrenched in the Charter, however. Courts must also recognize and differentiate the claims of disadvantaged groups to the benefit of section 15's guarantee of substantive equality. To date, the benefits to disadvantaged groups of this guarantee have been negligible, partly because disadvantaged groups lack the resources to gain access to the courts, but also because the courts have failed to recognize that there is a difference between formal equality and substantive equality.

A judicial policy of formal equality for all will not meet the needs of disadvantaged groups. Instead, it will perpetuate and further entrench their inequality.

Substantive equality problems require a substantive model of equality. This may appear radical, but that is only because it does not accord with more familiar ideas about equality. In fact, it is consistent with recent human rights and Charter decisions of the Supreme Court of Canada.

A substantive equality model is not a pat analytic tool that will automatically determine the outcome of every equality case. However, it carries with it a very simple and important message: substantive inequality is not about differences, it is about group disadvantage and subordination. If the Supreme Court of Canada were to endorse this simple message in its early section 15 decisions, it would mark the beginning of a new direction in Charter equality rights decision-making in courts all across the country, a new direction that women and other disadvantaged groups urgently need. If this new direction is not established, the entrenchment of equality rights may go down in history not as one step forward for women, but as two steps back.³³

Endnotes

1. *Law Society of Upper Canada v. Skapinker* (1984), [1984] 1 S.C.R. 357 at 366; *Hunter v. Southam* (1984), [1984] 2 S.C.R. 145 at 156-157; *Singh v. Minister of Employment and Immigration* (1985), [1985] 1 S.C.R. 177 at 209, 218-219; *R. v. Oakes* (1986), [1986] 1 S.C.R. 103 at 119.
 2. Dale Gibson comments on this point in *The Law of the Charter: General Principles* (Toronto: Carswell, 1986) at 28. The Ontario Court of Appeal in *Re Blainey and Ontario Hockey Association* (1986), 54 O.R. (2d) 513 applied human rights jurisprudence to interpret s. 15.
 3. *Winnipeg School Division No. 1 v. Craton* (1985), [1985] 2 S.C.R. 150 at 156 [hereinafter *Craton*].
 4. *Ontario Human Rights Commission v. Simpsons-Sears* (1985), [1985] 2 S.C.R. 536 at 547.
 5. This argument was advanced by LEAF at para. 28 in its factum, in *Andrews v. Law Society of British Columbia* (2 February 1989), File No. 19955/19956 (S.C.C.) [hereinafter *Mark Andrews*].
 6. *R. v. Oakes*, *supra*, note 1 at 136; *Société des Acadiens du Nouveau-Brunswick v. Association of Parents For Fairness in Education* (1986), [1986] 1 S.C.R. 549 at 579; *Caldwell v. Stuart* (1984), [1984] 2 S.C.R. 603 at 626.
 7. *R. v. Holmes* (1988), [1988] 1 S.C.R. 914 at 932 [hereinafter *Holmes*].
 8. *Edwards Books and Art Ltd. v. R.* (1986), [1986] 2 S.C.R. 713 at 779.
 9. Mary Jane Mossman argues that s. 15 is intended to promote equality of outcome rather than same treatment in "Gender, Equality, and the Charter" in *Research Studies of the Commission on Equality in Employment* (Ottawa: Supply and Services Canada, 1985) (Commissioner: R.S. Abella) at 297; Lynn Smith argues that Charter equality rights are "part of a paradigm for the solution of inequality problems, a paradigm which can only be understood through an understanding of the inequality problems themselves." See "A New Paradigm for Equality Rights" in L. Smith et al., eds., *Righting the Balance: Canada's New Equality Rights* (Saskatoon: Canadian Human Rights Reporter, 1986) 353 at 361-362. Additional discussion of the legislative history of ss. 15 and 28 is located in Chapters One and Two.
- However, as we have shown, in the first three years of equality rights adjudication, and with the exception of the Supreme Court of Canada which at the time of writing has not yet ruled on a s. 15 case, courts for the most part have not yet taken a purposive approach to the Charter's guarantee of substantive equality.
10. *Supra*, note 5.
 11. *MacKay v. R.* (1980), [1980] 2 S.C.R. 370 at 407.

12. Catharine MacKinnon argues that equality should be viewed in terms of dominance and subordination and that equality requires governmental action to eliminate those factors that contribute to the subordination of women, as well as to eradicate the consequences of a history of subordination. See C. MacKinnon, "Making Sex Equality Real", *Righting the Balance*, *supra*, note 9 at 37. Colleen Sheppard argues that an understanding of women's inequality entails recognition of the social subordination of women to men. See C. Sheppard, "Equality, Ideology and Oppression: Women and the Canadian Charter of Rights and Freedoms" in C.L.M. Boyle et al., eds., *Charterwatch: Reflections on Equality* (Toronto: Carswell, 1986) 195 at 216-218. Elizabeth Sheehy argues that the subordination principle is superior to other models (all variations on formal equality), for the resolution of sex equality problems. See E. Sheehy, *Personal Autonomy and the Criminal Law: Emerging Issues for Women* (Ottawa: Canadian Advisory Council on the Status of Women, 1987).
13. We are indebted to Catharine MacKinnon for her suggestion that the problem be stated in this way.
14. *Supra*, note 5.
15. As tribunals and courts have done in sex harassment cases such as *Zarankin v. Johnstone* (1984), 5 C.H.R.R. D/2274 (B.C. Bd. of Inquiry) aff'd (1985), 6 C.H.R.R. D/2651 (B.C.S.C.) and *Bell v. Ladas* (1980), 1 C.H.R.R. D/155 (Ont. Bd. of Inquiry).
16. *R. v. Big M Drug Mart* (1985), [1985] 1 S.C.R. 295; *Forget v. A.G. Quebec* (1988), [1988] 2 S.C.R. 90 [hereinafter *Forget*]; and *Huck v. Canadian Odeon Theatres Ltd.* (1985), 6 C.H.R.R. D/2682 (Sask. C.A.).
17. For example, *Craton*, *supra*, note 3; *Insurance Corporation of British Columbia v. Heerspink* (1982), [1982] 2 S.C.R. 145; *Ontario Human Rights Commission v. Simpsons-Sears*, *supra*, note 4; *Robichaud v. Canada (Treasury Board)* (1987) 2 S.C.R. 84; *Action Travail des Femmes v. Canadian National Railway* (1987), [1987] 1 S.C.R. 1114 [hereinafter *Action Travail*]; *Forget*, *supra*, note 16.
18. K.A. Lahey, "Feminist Theories of (In)Equality" in S.L. Martin and K.E. Mahoney, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) 71 at 83.
19. (1988), [1988] 1 S.C.R. 30.
20. *Ibid.* at 172.
21. *Action Travail*, *supra*, note 17 at 1134.
22. C. Sheppard, *supra*, note 12 at 218.
23. *Supra*, note 18 at 83.
24. *Forget*, *supra*, note 16 at 102.
25. *Supra*, note 12 at 222.

26. In *Smith v. R.* (1987), [1987] 1 S.C.R. 1045, Le Dain, J. said that a punishment found to be cruel and unusual contrary to s. 12 of the Charter could not be justified under s. 1 at 1111. In the same case, McIntyre, J. said, "It may well be said that, in s. 12, the Charter has created an absolute right." (at 1085). In *Reference Re Section 94(2) of the Motor Vehicle Act* (1985), [1985] 2 S.C.R. 486 at 523, Wilson, J. said that violations of s. 7 that are not in accord with the principles of fundamental justice cannot be justified in a free and democratic society. Unfortunately, the reasoning of Le Dain, J., McIntyre, J., and Wilson, J. in this pair of cases has not prevailed in the Supreme Court of Canada. However, it is to be hoped that the Court will be open to arguments against limits on women's substantive equality rights.
27. LEAF factum, *supra*, note 5, para. 51.
28. *Ibid.*, para. 50.
29. See "Supreme Court Year Busiest Since 1982", *The Globe and Mail*, 5 January 1989 at A-8.
30. *Reference Re Family Benefits Act (N.S.) S. 5* (1986), 75 N.S.R. (2d) 338 (S.C.A.D.).
31. Peter Westen, "The Empty Idea of Equality" (1982) 95 *Harvard Law Review* 537.
32. In *Holmes*, *supra*, note 7 at 47, Dickson, C.J.C., says the courts and the Charter can provide a voice and a remedy for "those excluded from equal and effective democratic participation in our society."
33. Kathleen Lahey states: "Unless Canadian judges move decisively to reject this so-called neutral and principled approach to equality, it will soon become virtually impossible to argue that the Charter is designed to eliminate the social, economic, or legal causes of actual inequality." See *supra*, note 18 at 82.



MARK ANDREWS

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Introduction

The Supreme Court of Canada's decision in *Mark Andrews* (February 2, 1989) sets a new and very different direction for the interpretation of equality rights from that set by the lower courts in the first three years of equality rights litigation. It offers clear encouragement to women and other disadvantaged groups by moving towards a substantive view of equality. However, the decision is not without weaknesses. In addition to leaving many important questions unanswered, it reveals a troubling split on the Court and closes some doors hard.

This postscript briefly outlines the structure of the decision and then analyses its strengths and weaknesses from the perspective of women and other disadvantaged groups who expect the Charter to assist in the advancement of their equality.

Structure

The *Mark Andrews* case was decided by six judges — Dickson, McIntyre, Lamer, Wilson, La Forest, and L'Heureux-Dubé — in three judgements written by Justices McIntyre, Wilson, and La Forest.

Justice McIntyre writes the principal decision on the interpretation of section 15 and his decision is concurred in by Chief Justice Dickson and Justices Lamer, Wilson, and L'Heureux-Dubé. Justice La Forest also indicates in a separate judgement that he is in substantial agreement with Justice McIntyre's view of section 15. However, in a decision written by Justice Wilson, three judges — Dickson, Wilson, and L'Heureux-Dubé — disagree with Justice McIntyre's judgement on the issue of the interpretation of section 1 and on the outcome of the case. With Justice La Forest, they form the majority on the outcome of the case. They find that the B.C. Law Society's requirement that its members be Canadian citizens violates section 15 and is not a reasonable limit on the equality rights of *Mark Andrews*.¹

The result of the three judgements when read as a whole is that all six justices agree on the basic elements of the interpretation of section 15 set out by Justice McIntyre; however, there is a four-two split on the outcome with Chief Justice Dickson and Justices Wilson, La Forest, and L'Heureux-Dubé forming the majority who rule in *Andrews*' favour, and Justices McIntyre and Lamer forming the minority who rule that the citizenship requirement is a reasonable limit within the meaning of section 1.

Strengths

Disadvantage

The most important element in the *Mark Andrews* decision is its acknowledgement that disadvantage is a concept relevant to section 15. Section 15 is not simply about dissimilarity in treatment between individuals or groups. In coming to this conclusion the Court finds that not every legislative distinction between groups creates a violation of section 15. Justice McIntyre states that the distinctions forbidden by section 15 are those that involve prejudice or disadvantage², and Justice Wilson more boldly states that "s. 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society . . ."³

Akin Grounds

The Court confirms that section 15's protection is open-ended and that grounds other than those named, such as citizenship, can be covered. However, because section 15 is designed to deal with disadvantage and not every distinction creates a violation, it is the Court's view that the open-ended protection extends only to grounds akin to those that are enumerated. Discrimination based on personal characteristics is prohibited in the enumerated grounds and therefore discrimination based on other, analogous personal characteristics is prohibited by the open-ended protection of section 15 as well. This seems to indicate that the claims of corporations will no longer be entertained by the courts when they allege, for example, that section 15 is violated because steel pop can manufacturers are treated differently from aluminum pop can manufacturers, because these cases are neither about disadvantage nor about personal characteristics. Also, because the Court accepts non-citizenship as a personal characteristic, it seems likely that grounds such as marital status and sexual orientation will be found to be covered by section 15.

Sameness / Difference

The Court finds that sameness and difference are not the compelling determiners of equality. Justice McIntyre says that though equality is a comparative concept "[i]t must be recognized at once, . . . that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality."⁴ Justice McIntyre then articulates a broad version of the comparison to be made. He writes:

Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another. In other words, the admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another.⁵

In light of this, the Court rejects the similarly situate test, which requires merely a comparison of whether individuals or groups are similarly situated in relation to the purpose of a law, finding it deficient "as a fixed rule or formula for the resolution of equality questions."⁶ In the Court's view, the test is mechanical and does not allow for consideration of the content of the law at issue or its impact.

Discrimination

In defining the discrimination which is prohibited in section 15, the Court adopts a broad interpretation from Canadian human rights jurisprudence which addresses the effect of discriminatory acts, not merely their intent. The Court refers to its own rulings in recent human rights cases⁷ and finds that unintentional and systemic discrimination are prohibited by section 15 of the Charter, as well as by human rights statutes. Laws which have an adverse impact on disadvantaged groups, even if they are neutral on their face, will violate the equality guarantee. Echoing his definition of equality, Justice McIntyre says:

... discrimination may be described as a distinction, whether intentional or not ... which has the effect of imposing burdens, obligations, or disadvantages on [an] ... individual or group not imposed on others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.⁸

Reasonableness

As the Court rejects the similarly situate test, it also rejects its companion — the reasonableness test developed by the B.C. Court of Appeal in the *Mark Andrews* case. The Court finds that injecting a reasonableness test into section 15 blurs the analyses of sections 15 and 1, which must be kept distinct in order that the burden of proof can be attributed to the appropriate party. "It is for the citizen to establish that his or her Charter right has been infringed", Justice McIntyre says, "and for the state to justify the infringement."⁹

The Bill of Rights

The Court repudiates *Lavell* and *Bliss*,¹⁰ rejecting the interpretations of equality developed under the *Canadian Bill of Rights* as insufficient for interpreting the Charter. It confirms that section 15 provides much broader protection and that new language was included in section 15 to remedy the shortcomings of the *Canadian Bill of Rights*.

Weaknesses

Disadvantage

The discussion of disadvantage is very cursory in this decision. Because disadvantage is a concept central to the development of a substantive model of equality, the thinness of the decision on this point is worrying. There is no exploration of the essence of disadvantage and little examination by the Court of the general question of how the determination is to be made that a group is disadvantaged and merits section 15 protection. Justice McIntyre quotes with approval Justice Hugessen in *Smith, Kline & French Laboratories Ltd. v. A.G. Canada*,¹¹ saying: "Questions of stereotyping, of historical disadvantage, in a word, of prejudice, are the focus ... [of section 15]." Although Justice Wilson refers to "those groups who suffer social, political and legal disadvantage",¹² she provides no criteria for identifying them.

When discussing the particular issue in this case, Justice McIntyre indicates that non-citizens come within the protection of section 15 because they are a "discrete and insular minority".¹³ Justice Wilson finds that non-citizens are "a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated."¹⁴ Justice La Forest adds that non-citizens are a group which has been discriminated against repeatedly in recent Canadian history through legislated limits on their rights to settle, own land, and be employed.

While these comments provide insight into the kinds of factors the Court considers relevant to determining who is disadvantaged, they do not form a solid analytical basis for future decision-making. There is no recognition in the judgements

that the term "sex" in section 15 covers both an advantaged and a disadvantaged group, and that courts will have to distinguish between men's sex equality claims and women's sex equality claims. Moreover, the characterization of disadvantaged groups as "discrete and insular minorit[ies]" reveals an insensitivity to women's equality which is all too familiar.

Scope

The Court slams the door again¹⁵ on the application of the Charter to the "private sector", this time ruling that section 15 will not apply. Justice McIntyre, distinguishing between human rights statutes and section 15 of the Charter, says: "... discrimination in section 15(1) is limited to discrimination caused by the application or operation of law, whereas the Human Rights Acts apply also to private activities."¹⁶ This statement is unequivocal and no exception is taken to it by the other judges.

We have argued that the Court's insistence on a public/private split is likely to rob women of the full benefit of section 15's protections.¹⁷ Women cannot draw the simple lines through their experience of inequality that the Court wishes to; as long as some discrimination is understood to be "private" and therefore not an issue of public responsibility, women will remain unequal. The Court appears to assume that discrimination in private activities can be addressed in whole through human rights acts. This assumption is not well-founded.¹⁸

Also it may be that even in the sphere which the Court regards as public, section 15 will be applied restrictively, that is, only to laws. Justice McIntyre declines to rule on whether "other governmental or quasi-governmental regulations, rules, or requirements may be termed laws under s. 15(1)"¹⁹ because it is not an issue in this case. Only Justice La Forest states that he does not accept such a restrictive interpretation.

Section 1

There is a split on the Court over the test to be applied when interpreting section 1. Justice McIntyre, with Justice Lamer concurring, distances himself from the Supreme Court's previous ruling on the interpretation of section 1 in *Oakes*,²⁰ which has been widely applied to other Charter rights. In that case, the Court found that, in order to override a guaranteed right, the objective of the law must relate to concerns which are "pressing and substantial" in a free and democratic society. Justice McIntyre considers this test too stringent in light of the broad range of social and economic measures which may be challenged under section 15. He states that the Court should ask not whether the objective of the law is pressing and substantial but whether a limit on a right represents "a legitimate exercise of the legislative power for the attainment of a desirable social objective . . ."²¹ He also states that there is no single test under section 1. This raises the spectre of governments being permitted to discriminate because judicial standards for justifying discrimination are low and ill-defined.

Fortunately, Chief Justice Dickson and Justices Wilson and L'Heureux-Dubé disagree with Justice McIntyre's judgement on this point. Justice Wilson finds that requiring government's concerns to be "pressing and substantial" before rights can

be overridden is wholly appropriate in the section 15 context "when it is recognized that not every distinction between individuals and groups will violate s. 15."²² She says: "Given that s. 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society, the burden resting on government to justify the type of discrimination against such groups is appropriately an onerous one."²³

Though Justice La Forest disagrees with Justice McIntyre's judgement on the result, he appears to agree with Justice McIntyre's approach to section 1. This means that there is a 3-3 split on the Court regarding this important issue.

Similarly Situate Test

While the Court has rejected the similarly situate test, it has not done so on the basis of a clear or thorough analysis. As well, the inadequacy of formal equality theory, which underlies the similarly situate test, is not directly discussed although it seems to be recognized.

Justice McIntyre's critique of the similarly situate test is seriously incomplete, because he refers only to the problems created by interpretations of "equality before the law". In the examples he gives, these interpretations resulted in findings that there was no violation of equality because everyone in a particular class was dealt with in the same way. The *Lavell* case²⁴ is cited. In such cases, he states, equal application of a bad law is not a realistic test for a violation of equality rights. However, Justice McIntyre does not identify the problems created by comparing a disadvantaged class to an advantaged class and finding them differently situated because of the difference that disadvantage makes, as the Ontario High Court did in the case of *Karen Andrews*.²⁵ Nor does he refer to any other problems inherent in the similarly situate test. Because the other judgements do not comment on this issue, Justice McIntyre's reasoning stands alone.

This deficiency in the Court's analysis creates a real danger that the similarly situate test and formal equality theory, though they appear to have been repudiated here, will seep back into the jurisprudence because they have not been properly examined and clearly rejected.

Conclusion

The Supreme Court's decision in *Mark Andrews* is encouraging. The Court has introduced the concept of disadvantage to section 15 analysis and has made human rights principles and jurisprudence a source for interpretive direction. It has clearly stated that section 15 is a broader protection than the *Canadian Bill of Rights* and that new interpretations of equality are required by it. The Court has opened the door for women and other disadvantaged groups to bring forward arguments based on a substantive equality model.

This decision, however, only marks the beginning of constitutional equality rights litigation. It is certainly not true that, with this one decision, formal equality theory, the similarly situate test, and reasonableness tests have been effectively swept away and a substantive equality model has been set in their place. The *Mark Andrews* decision is thin and it treats many central issues only cursorily. It is

essential that women and other disadvantaged groups now increase their efforts to put their views and experiences before the courts so that the *Mark Andrews* decision can be built on, and a full and effective judicial theory of substantive equality can be developed from this rudimentary beginning.

Endnotes

1. For a more detailed account of the facts in the *Mark Andrews* case, see Chapter Seven.
2. *Andrews v. Law Society of British Columbia* (2 February 1989), File No. 19955/56 (S.C.C.), per McIntyre, J. at 5. In his judgement, La Forest, J. states that s. 15 may also be used to address issues of fundamental unfairness. See the authors' discussion of this issue in Chapter Eight.
3. *Ibid.*, per Wilson, J. at 5.
4. *Supra*, note 2, per McIntyre, J. at 8.
5. *Supra*, note 2, per McIntyre, J. at 9.
6. *Supra*, note 2, per McIntyre, J. at 12.
7. *Ontario Human Rights Commission v. Simpsons-Sears* [1985] 2 S.C.R. 536 and *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)* [1987] 1 S.C.R. 1114.
8. *Supra*, note 2, per McIntyre, J. at 19.
9. *Supra*, note 2, per McIntyre, J. at 23.
10. *Attorney General of Canada v. Lavell* [1974] S.C.R. 1349 and *Bliss v. Attorney General of Canada* [1979] 1 S.C.R. 183.
11. [1987] 2 F.C. 359 at 369.
12. *Supra*, note 2, per Wilson, J. at 5.
13. *Supra*, note 2, per McIntyre, J. at 28.
14. *Supra*, note 2, per Wilson, J. at 3.
15. See references in the text to other cases ruling on the issue of scope in Chapter Four.
16. *Supra*, note 2, per McIntyre, J. at 19.
17. See Chapter Four.
18. See Chapter Three.
19. *Supra*, note 2, per McIntyre, J. at 8.
20. *R. v. Oakes* [1986] 1 S.C.R. 103.
21. *Supra*, note 2, per McIntyre, J. at 29.
22. *Supra*, note 2, per Wilson, J. at 5.

23. *Supra*, note 2, per Wilson, J. at 5.
24. For discussion of this case refer to Chapter One.
25. For discussion of the similarly situate test as applied in this case, see Chapter Seven.

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APPENDIX A
TABLE OF EQUALITY DECISIONS



Table Of Equality Decisions

1.(a) Criminal: Impaired Driving

CASE	CITATION	COURT
R. c. Daigle	[1986] R.J.Q. 1599	Que. C.S.P.
R. c. Grondin	(22 January 1988), Frontenac 235-01- 000089-870	Que. C.S.
R. c. Kiss	[1986] R.J.Q. 2416	Que. C.S.P.
R. v. Alfieri	(1985), 40 M.V.R. 132	Ont. Prov. Ct.
R. v. Asselin	(1986), 15 W.C.B. 489	Ont. Dist. Ct.
R. v. Aucoin	(1987), 79 N.S.R. (2d) 32	N.S.S.C. (A.D.)
R. v. Britton	(1986), 17 W.C.B. 346	Ont. Dist. Ct.
R. v. Carless	(1985), 40 M.V.R. 115	Ont. Prov. Ct.
R. v. Chiasson	(1986), 16 W.C.B. 159	Ont. Prov. Ct.
R. v. Clark	(1986), 74 N.S.R. (2d) 17	N.S.S.C. (A.D.)
R. v. Clark	(1986), 72 N.S.R. (2d) 199	N.S. Co. Ct.
R. v. Cornell	(1985), 14 O.A.C. 2	Ont. C.A.
R. v. Couture	(1986), 16 W.C.B. 189	Ont. Dist. Ct.
R. v. Dennehy	(1986), 26 C.C.C. (3d) 339	Y.T. Terr. Ct.
R. v. Dupuis	(1985), 17 C.R.R. 174	Ont. Prov. Ct.
R. v. Farnham	(1986), 52 Sask. R. 188	Sask. Q.B.
R. v. Frohman	(1987), 19 O.A.C. 180	Ont. C.A.
R. v. Hamilton	(1986), 57 O.R. (2d) 412	Ont. C.A.
R. v. Hamilton	(1985), 34 M.V.R. 185	Ont. Prov. Ct.
R. v. Hansen	(1986), 32 C.C.C. (3d) 199	B.C.S.C.

continued

Table Of Equality Decisions

1.(a) Criminal: Impaired Driving (cont'd)

CASE	CITATION	COURT
R. v. Hardiman	(1987), 78 N.S.R. (2d) 55	N.S.S.C. (A.D.)
R. v. Hardy	[1987] P.E.I.J. No. 88	P.E.I.C.A.
R. v. Hodgson	(1987), 1 W.C.B. (2d) 112	Ont. Prov. Ct.
R. v. Kern	(1987), 57 Sask. R. 57	Sask. Q.B.
R. v. Killen	(1985), 70 N.S.R. (2d) 278	N.S.S.C. (A.D.)
R. v. Kinghorn	(1985), 15 W.C.B. 149	Ont. Prov. Ct.
R. v. Klemencic	(1985), 36 M.V.R. 50	Ont. Dist. Ct.
R. v. Kruper	(1986), [1986] 5 W.W.R. 274	Alta. Prov. Ct.
R. v. MCO	(1986), 16 W.C.B. 124	Ont. Dist. Ct.
R. v. Maurice	(1985), 15 W.C.B. 64	Ont. Prov. Ct.
R. v. McPherson	(1986), [1986] 6 W.W.R. 366	Alta. Q.B.
R. v. Mumford	(1986), 16 W.C.B. 66	Ont. Dist. Ct.
R. v. Musselman	(1987), 55 Sask. R. 233	Sask. Q.B.
R. v. Nolan	(1986), 44 M.V.R. 46	Alta. Prov. Ct.
R. v. Notarianni	(1986), 16 W.C.B. 67	Ont. Prov. Ct.
R. v. Pelletier	(1986), 16 W.C.B. 483	Ont. Prov. Ct.
R. v. Prince	(1986), 1 Y.R. 188	Y. Terr. Ct.
R. v. Rodd	(1987), 67 Nfld. & P.E.I.R. 215	P.E.I.S.C. (T.D.)
R. v. Russell	(1987), 78 N.S.R. (2d) 66	N.S.S.C. (A.D.)
R. v. Sawchuk	(1986), 50 Sask. R. 148	Sask. C.A.
R. v. Sawchuk	(1986), 45 Sask. R. 164	Sask. Q.B.

continued

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1.(a) Criminal: Impaired Driving (cont'd)

CASE	CITATION	COURT
R. v. Schell	(1986), 54 Sask. R. 79	Sask. Q.B.
R. v. Schneider	(1986), 50 Sask. R. 146	Sask. C.A.
R. v. Seo	(1986), 54 O.R. (2d) 293	Ont. C.A.
R. v. Spencer- Clayton	(1985), 15 W.C.B. 375	Ont. Prov. Ct.
R. v. Stogdill	(1985), 14 W.C.B. 331	Ont. Dist. Ct.
R. v. Wiklun	(1987), [1987] 2 W.C.B. (2d) 246	Sask. Q.B.
R. v. Wowk	(1986), 68 A.R. 78	Alta. C.A.
R. v. Wowk	(1985), 15 W.C.B. 3	Alta. Prov. Ct.

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1.(b) Criminal: Sexual Offences

CASE	CITATION	COURT
Protection de la jeunesse — 274	(1987), [1987] R.J.Q. 1927	Que. T.J.
R. v. B. (W.D.)	[1987] S.J. No. 631	Sask. C.A.
R. v. Barrons	(1985), 70 A.R. 107	Alta. Q.B.
R. v. Bearhead	(1986), 27 C.C.C. (3d) 546	Alta. Q.B.
R. v. Brown	(1987), 59 Sask. R. 220	Sask. C.A.
R. v. Drybones	(1985), 23 C.C.C. (3d) 457	N.W.T.S.C.
R. v. Ferguson	(1987), 16 B.C.L.R. (2d) 273	B.C.C.A.
R. v. Gudbranson	(1985), 14 W.C.B. 299	B.C. Prov. Ct.
R. v. Halleran	(1987), 66 Nfld. & P.E.I.R. 314	Nfld. C.A.
R. v. Hill	(1986), [1986] 1 S.C.R. 313	S.C.C.
R. v. Howell	(1986), 57 Nfld. & P.E.I.R. 198	Nfld. Dist. Ct.
R. v. Khadikin	(1986), 29 C.C.C. (3d) 154	B.C.S.C.
R. v. L.	[1985] D.R.S. 19-512	Ont. Div. Ct.
R. v. L. (Lee Allen)	(1986), 16 W.C.B. 483	Ont. Prov. Ct.
R. v. Lucas	(1985), 16 C.R.R. 1	Ont. Dist. Ct.
R. v. Lucas; R. v. Neely	(1986), 27 C.C.C. (3d) 229	Ont. C.A.
R. v. M.E.D.	(1985), 47 C.R. (3d) 382	Ont. Prov. Ct.
R. v. MacDonald	(1987), 79 N.S.R. 215	N.S.S.C. (T.D.)

continued

Table Of Equality Decisions

1.(b) Criminal: Sexual Offences (cont'd)

CASE	CITATION	COURT
R. v. Monk	(1985), 43 Sask. R. 318	Sask. Q.B.
R. v. Neely	(1985), 22 C.C.C. (3d) 73	Ont. Dist. Ct.
R. v. Perkins	(1987), 59 C.R. (3d) 56	N.W.T.S.C.
R. v. Poirier	(1985), 69 N.B.R. (2d) 1	N.B. Prov. Ct.
R. v. Ross	(1986), 15 W.C.B. 490	N.W.T.S.C.
R. v. S. (R.)	[1987] B.C.J. No. 1255	B.C. Co. Ct.
R. v. Smith	(1985), 16 W.C.B. 286	Ont. Prov. Ct.
R. v. Thorburn	(1986), 26 C.C.C. (3d) 154	B.C.C.A.
R. v. W.D.C.G.	(1987), 81 N.B.R. (2d) 86	N.B.C.A.
Re Walsh	(1986), 17 W.C.B. 462	Sask. C.A.
U.S.A. v. Binder	(1985), 16 W.C.B. 72	Ont. Dist. Ct.

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1.(c) Criminal: Attorney General's Powers in Criminal Proceedings

CASE	CITATION	COURT
A.G. Canada v. Canada Packers Inc.	(1985), 8 C.P.R. (3d) 199	Alta. Q.B.
Chartrand c. Marx	(1986), [1987] R.J.Q. 331	Que. C.S.
Chartrand v. Quebec (Min. of Justice)	(1986), 55 C.R. (3d) 97	Que. C.S.
P.G. Québec c. Chartrand	(1987), [1987] R.J.Q. 1732	Que. C.A.
R. v. Andrew	(1986), [1986] 6 W.W.R. 323	B.C.S.C.
R. v. Ertel	(1987), 20 O.A.C. 257	Ont. C.A.
R. v. Flight	(1985), 14 W.C.B. 335	B.C.S.C.
R. v. Hancock	(1986), 53 Sask. R. 203	Sask. C.A.
R. v. Hill	(1987), 57 Sask. R. 234	Sask. Q.B.
R. v. Johnston	(1985), 15 W.C.B. 27	Ont. Dist. Ct.
R. v. Kevork	(1986), 27 C.C.C. (3d) 271	Ont. H.C.
R. v. Speicher	[1983] B.C.D. Crim. Conv. 5930-01	B.C.S.C.
R. v. Tutty	(1986), 73 N.S.R. (2d) 387	N.S.S.C. (T.D.)
Re Brown	(1986), 16 W.C.B. 71	B.C.S.C.
Re Kevork and R.	(1985), 21 C.C.C. (3d) 369	Ont. C.A.
Re Patrick and A.G. Canada	(1987), 35 C.C.C. (3d) 551	B.C.C.A.
Re Patrick and A.G. Canada	(1986), 28 C.C.C. (3d) 417	B.C.S.C.

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1.(d) Criminal: Sentencing, Prison, Release

CASE	CITATION	COURT
Dempsey v. A.G. Canada	(1986), 25 C.C.C. (3d) 193	F.C.A.
Dempsey v. Canada	(1986), 8 F.T.R. 1	F.C.T.D.
Dempsey v. R.	(1987), 34 C.C.C. (3d) 95	F.C.A.
Henry v. Commissioner of Penitentiaries	(1987), 10 F.T.R. 166	F.C.T.D.
Horii v. Canada (Commissioner of Corrections)	(1987), 17 F.T.R. 190	F.C.T.D.
Johnson v. R.	(1986), 44 Man. R. (2d) 145	Man. Q.B.
R. v. C.M.	(1985), 14 W.C.B. 334	B.C. Prov. Ct.
R. v. Lightbody	(1985), 22 C.C.C. (3d) 349	Ont. C.A.
R. v. Miles of Music Ltd.	(1987), 14 C.P.R. (3d) 181	Ont. Prov. Ct.
R. v. R.C.M.	(1985), 36 Man. R. (2d) 252	Man. Q.B.
R. v. Sunila (No. 5)	(1986), 73 N.S.R. (2d) 322	N.S.S.C. (T.D.)
R. v. Wallace	(1987), 2 W.C.B. (2d) 73	Ont. Dist. Ct.
Re Logan	(1986), 1 W.C.B. (2d) 307	B.C.S.C.
Renaud v. Canada	(1987), 9 F.T.R. 114	F.C.T.D.
Renaud v. Canada	(1986), 4 F.T.R. 239	F.C.T.D.
Weatherall v. A.G. Canada	(1987), 11 F.T.R. 279	F.C.T.D.

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1.(e) Criminal: Highway Traffic

CASE	CITATION	COURT
A.G. British Columbia v. Huband Prov. J.	(1986), [1986] 5 W.W.R. 520	B.C.S.C.
Hundal v. Superintendent of Motor Vehicles	(1985), [1985] 5 W.W.R. 449	B.C.C.A.
R. v. Cutts	(1986), 30 C.C.C. (3d) 303	B.C. Co. Ct.
R. v. Finlayson	(1985), 23 C.C.C. (3d) 574	B.C. Co. Ct.
R. v. Neale	(1986), 28 C.C.C. (3d) 345	Alta. C.A.
R. v. Robertson	(1987), 2 W.C.B. (2d) 446	Alta. Q.B.
Re Page	(1986), 17 W.C.B. 153	B.C.S.C.
Re Workman and The Queen	(1987), 37 C.C.C. (3d) 187	Y.T.S.C.

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1.(f) Criminal: Rape Shield Laws

CASE	CITATION	COURT
R. v. D. (G.)	[1987] O.J. No. 1015	Ont. H.C.
R. v. G.	(1985), 20 C.C.C. (3d) 149	N.S.S.C. (T.D.)
R. v. LeGallant	(1986), [1986] 6 W.W.R. 372	B.C.C.A.
R. v. LeGallant	(1985), 47 C.R. (3d) 170	B.C.S.C.
R. v. R.	(1986), 28 C.C.C. (3d) 188	Ont. H.C.
R. v. Unnamed Person	[1986] O.J. No. 570	Ont. H.C.
R. v. Wiseman	(1985), 22 C.C.C. (3d) 12	Ont. Dist. Ct.

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1.(g) Criminal: Defence of Insanity

CASE	CITATION	COURT
R. v. Swain	(1986), 53 O.R. (2d) 609	Ont. C.A.
R. v. Swain	(1985), 15 W.C.B. 114	Ont. Dist. Ct.
Re Rebic and The Queen	(1985), 20 C.C.C. (3d) 196	B.C.S.C.
Rebic v. Collver Prov. J.	(1986), [1986] 4 W.W.R. 401	B.C.C.A.

1.(h) Criminal: Dangerous Offender Provisions

CASE	CITATION	COURT
R. v. Carlson	(1985), 16 W.C.B. 225	B.C. Prov. Ct.
R. v. Noyes	(1986), 6 B.C.L.R. (2d) 306	B.C.S.C.
Re Milne and The Queen	(1985), 14 W.C.B. 333	Ont. C.A.

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1.(i) Criminal: Other Cases re Criminal Procedure

CASE	CITATION	COURT
Finnen v. R.	[1984] F.C.A.D. 2392-01	F.C.A.
R. v. Bailey	(1985), 17 C.R.R. 1	Y.T.S.C.
R. v. Blundon	(1987), 63 Nfld. & P.E.I.R. 253	Nfld. S.C.
R. v. Byers	(1987), 36 C.C.C. (3d) 86	P.E.I.S.C.
R. v. C. (R.)	(1987), 56 C.R. (3d) 185	Ont. C.A.
R. v. Cecchini	(1985), 22 C.C.C. (3d) 323	Ont. H.C.
R. v. Charters	(1986), 71 N.B.R. (2d) 31	N.B. Prov. Ct. (Crim. Div.)
R. v. Fatt	(1986), 30 C.C.C. (3d) 69	N.W.T.S.C.
R. v. Favel	60 Sask. R. 176	Sask. C.A.
R. v. Gladue	[1982] B.C.D. Crim. Conv. 5980-08	B.C.S.C.
R. v. Hart	(1986), 58 Nfld. & P.E.I.R. 190	Nfld. C.A.
R. v. Johnson	(1986), 17 W.C.B. 305	Man. Q.B.
R. v. Johnstone	(1986), 72 N.S.R. (2d) 76	N.S.S.C. (A.D.)
R. v. Johnstone	(1985), 68 N.S.R. (2d) 302	N.S.S.C. (T.D.)
R. v. Joi-Terra Farms Ltd.	(1987), 79 N.S.R. (2d) 203	N.S. Co. Ct.
R. v. Lewis	(1987), 1 W.C.B. (2d) 383	N.B.Q.B.
R. v. Martin	(1987), 22 O.A.C. 251	Ont. C.A.
R. v. Martin	(1985), 15 W.C.B. 245	Ont. H.C.
R. v. Mazur	(1986), 27 C.C.C. (3d) 359	B.C.C.A.

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1.(i) Criminal: Other Cases re Criminal Procedure (cont'd)

CASE	CITATION	COURT
R. v. Nolan	(1987), 1 W.C.B. (2d) 221	Nfld. S.C. (T.D.)
R. v. Nowlan	(1986), [1987] 1 Y.R. 253	Y.T.S.C.
R. v. Olson	(1987), 34 C.C.C. (3d) 564	Man. Q.B.
R. v. Punch	(1985), [1986] 1 W.W.R. 592	N.W.T.S.C.
R. v. Quesnel	(1986), 17 W.C.B. 259	Ont. Prov. Ct.
R. v. Ross	(1986), 53 C.R. (3d) 81	Ont. H.C.
R. v. Stoddart	(1987), 20 O.A.C. 365	Ont. C.A.
R. v. Turpin	(1987), 22 O.A.C. 261	Ont. C.A.
R. v. Turpin	(1985), 18 C.R.R. 323	Ont. H.C.
R. v. W.H.	(1986), 63 Nfld. & P.E.I.R. 302	Nfld. S.C.
R. v. White	(1986), 60 Nfld. & P.E.I.R. 223	Nfld. S.C.
R. v. Willar	(1985), 15 W.C.B. 121	Ont. Dist. Ct.
Re Baker and The Queen	(1986), 26 C.C.C. (3d) 123	B.C.S.C.
Re Doody	(1985), 34 M.V.R. 147	Nfld. S.C. (T.D.)
Re H.P.H., Jr.	(1987), 76 A.R. 235	Alta. Prov. Ct. (Yth. Div.)
Re Hamilton and R.	(1986), 30 C.C.C. (3d) 65	B.C.S.C.
Re Hanneson and The Queen	(1987), 31 C.C.C. (3d) 560	Ont. H.C.
Re Harper	(1986), 70 N.B.R. (2d) 361	N.B.Q.B. (T.D.)

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1.(i) Criminal: Other Cases re Criminal Procedure (cont'd)

CASE	CITATION	COURT
Re Koleff and R.	(1987), 33 C.C.C. (3d) 460	Man. Q.B.
Universal SPA Ltée c. Valois	(1984), [1985] C.S. 216	Que. C.S.

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2. Young Offenders Act

CASE	CITATION	COURT
Jones v. A.G. British Columbia	(1985), 63 B.C.L.R. 137	B.C.S.C.
R. v. A.M.	(1985), 47 C.R. (3d) 355	Ont. C.A.
R. v. B. (Richard)	(1986), 17 W.C.B. 217	Ont. Prov. Ct.
R. v. B.R.H.	(1985), 41 Sask. R. 190	Sask. Q.B.
R. v. C. (Jason)	(1986), 16 W.C.B. 113	Ont. Prov. Ct.
R. v. C. (Robert)	(1986), 16 W.C.B. 380	Ont. H.C.J.
R. v. C. (Robert)	(1986), 16 W.C.B. 346	Ont. Prov. Ct.
R. v. C.G.	(1985), 20 C.C.C. (3d) 398	N.T.W.S.C.
R. v. Chin	(1985), 20 C.C.C. (3d) 87	B.C. Co. Ct.
R. v. D.	(1985), [1985] 6 W.W.R. 79	Sask. Q.B.
R. v. D.G.	(1986), 16 W.C.B. 347	B.C. Prov. Ct.
R. v. D.F.G.	(1986), 29 C.C.C. (3d) 451	B.C.C.A.
R. v. G. (K.)	(1986), [1987] 1 W.W.R. 457	Alta. C.A.
R. v. G. (K.)	[1987] A.J. No. 80	Alta. Prov. Ct. (Yth. Div.)
R. v. G.J.M.	(1985), 15 W.C.B. 242	Ont. Prov. Ct.
R. v. G.M.	(1985), 24 C.C.C. (3d) 288	Ont. Prov. Ct. (Fam. Div.)
R. v. J.C.	(1986), 72 A.R. 119	Alta. Prov. Ct. (Yth. Div.)
R. v. L. (Robbie)	(1985), 14 W.C.B. 401	Ont. Prov. Ct.

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2. *Young Offenders Act* (cont'd)

CASE	CITATION	COURT
R. v. L.S.	(1985), 43 Sask. R. 146	Sask. C.A.
R. v. L.S.	(1985), 41 Sask. R. 181	Sask. Q.B.
R. v. Lawrence	(1985), 72 N.S.R. (2d) 21	N.S.S.C. (A.D.)
R. v. M. (Michael)	(1987), [1987] 2 W.C.B. (2d) 459	Y.T. Yth. Ct.
R. v. P.J.T.	(1985), [1986] 1 W.W.R. 690	Alta. C.A.
R. v. R.D.L.	(1985), 47 C.R. (3d) 378	Ont. C.A.
R. v. R.L.	(1985), 26 C.C.C. (3d) 417	Ont. C.A.
R. v. S. (Corey)	(1985), 15 W.C.B. 419	Ont. Prov. Ct.
R. v. S. (John Richard)	(1986), 17 W.C.B. 448	Ont. Dist. Ct.
R. v. S. (Sheldon)	(1988), 26 O.A.C. 285	Ont. C.A.
R. v. S. (Sheldon)	(1986), 17 W.C.B. 399	Ont. Prov. Ct.
R. v. S.D.	(1985), 41 Sask. R. 183	Sask. Q.B.
R. v. Spokes	(1985), 14 W.C.B. 368	Alta. Prov. Ct.
R. v. Starblanket	(1985), [1985] 6 W.W.R. 673	Sask. C.A.
R. v. W.	(1985), 22 C.C.C. (3d) 269	B.C.S.C.
R. v. W. (Gary Neil)	(1985), 16 W.C.B. 42	Ont. Prov. Ct.
R. v. W.W.W.	(1985), [1985] 5 W.W.R. 147	Man. C.A.
R. v. Welby	(1985), 15 W.C.B. 112	B.C.S.C.
R. v. Y.D.	(1985), 67 N.B.R. (2d) 269	N.B.Q.B. (Fam. Div.)

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2. *Young Offenders Act* (cont'd)

CASE	CITATION	COURT
Re M and The Queen	(1985), 21 C.C.C. (3d) 116	Man. Q.B.
Re McDonald and R.	(1985), 51 O.R. (2d) 745	Ont. C.A.

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3.(a) Civil Procedure: Costs

CASE	CITATION	COURT
Aukema v. Bernier Kitchen Cabinets Inc.	(1987), [1987] 5 W.W.R. 122	Alta. Q.B.
Bassilios c. Asselin	(1986), [1987] R.J.Q. 406	Que. C.S.
Booth Construction Ltd. v. Estabrook Construction Ltd.	(1987), 55 Alta. L.R. (2d) 157	Alta. Q.B.
Canada Trustco Mortgage Co. v. Kassian	(1986), 38 A.C.W.S. (2d) 254	Alta. Q.B.
Conkle c. Vitale	(1988), [1988] R.J.Q. 476	Que. C.S.
Coteleur v. Varty	(1986), 2 A.C.W.S. (3d) 62	Ont. S.C.
Danson v. A.G Ontario	[1987] 5 A.C.W.S. (3d) 313	Ont. C.A.
Danson v. A.G. Ontario	(1986), 55 O.R. (2d) 1	Ont. H.C.
Émile A. Benoit c. Gestion Tex-D Inc.	(1987), [1988] R.J.Q. 1401	Que. C.S.
Flèche Verte Ltée v. Dominion Insurance Corp.	(1987), 79 N.B.R. (2d) 236	N.B.Q.B. (T.D.)
Gerald Shapiro Holdings Inc. v. Nathan Tassis & Associates Inc.	(1986), 13 C.P.C. (2d) 288	Ont. S.C.
Isabelle v. Campbellton Regional Hospital	(1987), 38 D.L.R. (4th) 638	N.B.Q.B.
Johnston v. Law Society of Prince Edward Island	(1987), 67 Nfld. & P.E.I.R. 3	P.E.I.S.C. (G.D.)

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3.(a) Civil Procedure: Costs (cont'd)

CASE	CITATION	COURT
Kask v. Shimizu	(1986), [1986] 4 W.W.R. 154	Alta. Q.B.
Mangold v. 330002 Ontario Ltd.	(1986), 57 O.R. (2d) 716	Ont. H.C.
McBeth v. Dalhousie University	(1986), 72 N.S.R. (2d) 224	N.S.S.C. (A.D.)
McBeth v. Dalhousie University	(1985), 68 N.S.R. (2d) 265	N.S.S.C. (T.D.)
McLaren v. Mahaffy	(1986), 10 C.P.C. (2d) 243	Ont. H.C.
Reed v. Shymanski	(1986), 46 Alta. L.R. (2d) 191	Alta. Q.B.
Singh v. Dura	(1987), [1987] 4 W.W.R. 549	Alta. Q.B.
Stebill Ltd. v. Ball Brothers Ltd.	(1987), 7 W.D.C.P. 294	Ont. H.C.
Tory, Tory, DesLauriers and Binnington v. Concert Productions International Inc.	(1986), 14 C.P.C. (2d) 103	Ont. S.C.

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3.(b) Civil Procedure: Rights to Sue/Damages

CASE	CITATION	COURT
Bartello v. Canada Post Corp.	(1987), 62 O.R. (2d) 652	Ont. H.C.
Budge v. Workers' Compensation Board (Alta.) No. 2	(1987), 80 A.R. 207	Alta. Q.B.
Davidson v. Davidson	(1986), 38 A.C.W.S. (2d) 427	B.C.C.A.
Davidson v. Davidson Estate	(1986), [1987] 2 W.W.R. 642	B.C.C.A.
Falconer v. British Columbia	(1987), 5 A.C.W.S. (3d) 75	B.C. Co. Ct.
Grabbe v. Grabbe	(1986), [1987] 2 W.W.R. 657	B.C.C.A.
Piercey v. General Bakeries Ltd.	(1986), 61 Nfld. & P.E.I.R. 147	Nfld. S.C. (T.D.)
Power v. Moss	(1986), 61 Nfld. & P.E.I.R. 5	Nfld. S.C.
R. v. Shupe	(1987), [1987] 5 W.W.R. 656	Alta. Q.B.
Re Energy Probe and A.G. Canada	(1987), 42 D.L.R. (4th) 349	Ont. H.C.
Reference Re Sections 32 and 34 of the Workers' Compensation Act	(1987), 67 Nfld. & P.E.I.R. 16	Nfld. C.A.
Roncato v. O'Brien	(1987), 6 A.C.W.S. (3d) 413	Ont. H.C.
Sandhu v. Mann	(1986), 9 B.C.L.R. (2d) 254	B.C.S.C.
Schierz v. Dodds	(1986), 4 Q.A.C. 20	Que. C.A.

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3.(b) Civil Procedure: Rights to Sue/Damages (cont'd)

CASE	CITATION	COURT
Shkwarchuk v. Hansen	(1984), 30 C.C.L.T. 121	Sask. Q.B.
Zakerson v. Jubilee Residences Inc.	(1986), 52 Sask. R. 198	Sask. Q.B.

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3.(c) Civil Procedure: Limitation Periods

CASE	CITATION	COURT
Bera v. Marr	(1986), 27 D.L.R. (4th) 161	B.C.C.A.
Bowser v. Sinjakewitsch	(1987), 10 W.D.C.P. 5	Ont. Dist. Ct.
Brochner v. MacDonald	(1987), 83 A.R. 117	Alta. Q.B.
Elliot v. Saskatoon	(1986), [1986] 3 W.W.R. 575	Sask. C.A.
Gagner v. Mission (Dist.)	(1987), 14 B.C.L.R. (2d) 328	B.C.S.C.
Kuroлак v. Minister of Highways and Transportation (Sask.)	(1986), [1986] 4 W.W.R. 323	Sask. Q.B.
Mirhadizadeh v. Ontario	(1986), 56 O.R. (2d) 441	Ont. H.C.
Papamonopoulos v. Toronto Board of Education	(1986), 56 O.R. (2d) 1	Ont. C.A.
Papamonopoulos v. Toronto Board of Education	(1985), 1 W.D.C.P. 448	Ont. Dist. Ct.
Rosati v. Niagara Falls (City)	(1987), 5 A.C.W.S. (3d) 211	Ont. Dist. Ct.
Sawh v. Petrie	(1986), 72 N.S.R. 316	N.S.C.A.
Sheets v. Burlington (City)	(1987), 3 A.C.W.S. (3d) 163	Ont. Dist. Ct.
Streng v. Winchester (Township)	(1986), 56 O.R. (2d) 649	Ont. H.C.

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3.(c) Civil Procedure: Limitation Periods (cont'd)

CASE	CITATION	COURT
Toronto Transit Commission v. Mississauga (City)	(1987), 8 W.D.C.P. 81	Ont. Dist. Ct.

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3.(d) Civil Procedure: Other Cases re Civil and Administrative Procedure

CASE	CITATION	COURT
Assembly of the Church of the Universe v. R.	(1985), 15 W.C.B. 422	F.C.T.D.
Campbell v. A.G. Ontario	(1986), 58 O.R. (2d) 209	Ont. H.C.
Crupi v. Royal Ottawa Hospital	(1986), 12 C.P.C. (2d) 207	Ont. Dist. Ct.
Datta v. Saskatchewan Medical Care Insurance Commission	(1986), 52 Sask. R. 18	Sask. C.A.
Dence v. Prince Albert (Board of Police Commissioners)	[1987] S.J. No. 5	Sask. C.A.
Father Don's Natural Products Ltd. v. Canada	(1986), 65 N.R. 62	F.C.A.
K Mart Canada Ltd. v. Millmink Developments Ltd.	(1986), 6 W.D.C.P. 378	Ont. S.C.
K Mart Canada Ltd. v. Millmink Developments Ltd.	(1986), 56 O.R. (2d) 422	Ont. H.C.
K Mart Canada v. Millmink Developments Ltd.	(1986), 39 A.C.W.S. (2d) 65	Ont. S.C.
Kiely v. R.	(1987), 7 W.D.C.P. 380	F.C.T.D.

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3.(d) Civil Procedure: Other Cases re Civil and Administrative Procedure (cont'd)

CASE	CITATION	COURT
McHarg v. Saskatoon (Board of Police Commissioners)	(1985), 43 Sask. R. 120	Sask. Q.B.
Metropolitan Stores (MTS) Ltd. v. Manitoba Food and Commercial Workers	(1986), 38 A.C.W.S. (2d) 205	Man. Q.B.
Multiform Manufacturing Co. c. R.	(1987), [1987] R.J.Q. 879	Que. C.S.
Noyes v. South Cariboo	(1985), 64 B.C.L.R. 287	B.C.S.C.
Quibell v. Universal Engine Service and Supply Inc.	[1987] S.J. No. 301	Sask. Q.B.
R.L. Crain v. Restrictive Trade Practices Commission	[1982] Sask. D. 73-01	Sask. Q.B.
Re Edmonton Journal and A.G. Alberta	(1987), 78 A.R. 375	Alta. C.A.
Re Edmonton Journal and A.G. Alberta	(1985), 22 D.L.R. (4th) 446	Alta. Q.B.
Re MacBride and MacBride	(1986), 58 O.R. (2d) 230	Ont. Unif. Fam. Ct.
Re Smoke	(1987), 9 W.D.C.P. 245	Ont. S.C.

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3.(d) Civil Procedure: Other Cases re Civil and Administrative Procedure
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CASE	CITATION	COURT
Re Trumble and Town of Kapuskasing	(1986), 57 O.R. (2d) 139	Ont. H.C.
Sampson v. McGregor	[1987] N.S.J. No. 391	N.S.C.A.
Surrey Credit Union v. Mendonca	(1985), 67 B.C.L.R. 310	B.C.S.C.
Tracey v. University of New Brunswick	(1987), 80 N.B.R. (2d) 344	N.B.Q.B. (T.D.)
Twinn v. Canada	(1986), 6 F.T.R. 138	F.C.T.D.
Vilamar, S.A. c. Sparling	(1987), [1987] R.J.Q. 2186	Que. C.S.

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4. Economic Regulation

CASE	CITATION	COURT
4 T Farms Ltd. v. Saskatchewan (Agricultural Credit Corp.)	[1987] S.J. No. 84	Sask. Q.B.
Aerlinte Eireann Teoranta v. Canada	(1987), 9 F.T.R. 29	F.C.T.D.
B.C. Milk Board v. Clearview Dairy Farm Inc.	(1987), [1987] 4 W.W.R. 279	B.C.C.A.
B.C. Milk Board v. Clearview Dairy Farm Inc.	(1986), 33 D.L.R. (4th) 158	B.C.C.A.
B.C. Milk Board v. Clearview Dairy Farm Inc.	(1986), 69 B.C.L.R. 220	B.C.S.C.
Bagnell v. Canada (Department of Fisheries and Oceans)	(1987), 10 F.T.R. 150	F.C.T.D.
Bank of Montreal v. Rolseth	(1986), 66 A.R. 381	Alta. Q.B.
Barker v. Man. (Reg. of Motor Vehicles)	(1987), [1988] 2 W.W.R. 28	Man. Q.B.
Bertram S. Miller Ltd. v. Canada	(1986), 69 N.R. 1	F.C.A.
Brown v. Vancouver	(1986), 69 B.C.L.R. 308	B.C.S.C.
Buckam v. Holthuysen	(1985), 32 A.C.W.S. (2d) 476	B.C.C.A.
Buckam v. Holthuysen (No. 2)	(1986), 36 A.C.W.S. (2d) 380	B.C.C.A.

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4. *Economic Regulation* (cont'd)

CASE	CITATION	COURT
Cabre Exploration Ltd. v. Arndt	(1986), [1986] 4 W.W.R. 261	Alta. Q.B.
Cabre Exploration Ltd. v. Arndt and Alberta	Appeal No: 8603-0646-AC, [unreported]	Alta. C.A.
Canadian Odeon Theatres v. Winnipeg	(1985), 37 Man. R. (2d) 177	Man. C.A.
City of Brossard v. Pelletier	(1986), [1986] 1 S.C.R. 53	S.C.C.
Continental Distributors Ltd. v. Richmond (Township)	[1985] B.C.D. 10.2957/01	B.C.S.C.
D&H Holdings Ltd. v. Vancouver	(1985), 64 B.C.L.R. 102	B.C.S.C.
First City Trust Co. v. Pintye	[1986] A.J. No. 618	Alta. Q.B.
Fort McMurray Roman Catholic School District No. 32 v. Fort McMurray School District No. 2833	[1986] Alta. D. 245-01	Alta. Q.B.
Francen v. Winnipeg (City) (No. 2)	(1987), 48 Man. R. (2d) 276	Man. Q.B.
Hall v. A.G. New Brunswick	(1986), 72 N.B.R. (2d) 399	N.B.Q.B. (T.D.)

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4. Economic Regulation (cont'd)

CASE	CITATION	COURT
Homemade Winecrafts (Canada) Ltd. v. A.G. British Columbia	(1986), 26 D.L.R. (4th) 468	B.C.S.C.
L'Association des Détaillants en Alimentation c. La Ferme Carnaval Inc.	(1986), [1986] R.J.Q. 2513	Que. C.S.
London Drugs Ltd. v. Red Deer (City)	(1987), 81 A.R. 87	Alta. Q.B.
London Drugs Ltd. v. Red Deer (City)	(1987), [1987] 6 W.W.R. 588	Alta. Q.B.
MacKinnon v. Canada	(1986), 6 F.T.R. 203	F.C.T.D.
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R. v. CLP Canmarket Lifestyle Products Corp.	(1987), [1987] 5 W.W.R. 687	Man. Q.B.
R. v. D'Entremont	(1987), 2 W.C.B. (2d) 385	N.S. Co. Ct.
R. v. Genge	(1986), 17 W.C.B. 349	Nfld. S.C. (T.D.)
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R. v. Institute of Edible Oil Foods	[1987] O.J. No. 1189	Ont. H.C.
R. v. Myrrmidon Inc.	(1987), [1987] 6 W.W.R. 204	Man. Q.B.
R. v. Nouveautés Capital Ltée	(1987), 34 C.C.C. (3d) 67	Que. C.S.
R. v. Professional Technology of Canada Ltd.	(1986), 12 C.P.R. (3d) 218	Alta. Prov. Ct.
R. v. Quesnel	(1985), 53 O.R. (2d) 338	Ont. C.A.
R. v. Sobeys Stores Ltd.	(1986), 16 W.C.B. 197	N.B.Q.B.
R. v. Videoflicks; also indexed as R. v. Edwards Books	(1986), [1986] 2 S.C.R. 713	S.C.C.
R. v. Westfair	(20 August 1987), [unreported]	Sask. Q.B.

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Re Aluminum Co. and The Queen	(1986), 55 O.R. (2d) 522	Ont. Div. Ct.
Re Northwest Territories (Min. of Justice)	[1986] N.W.T.J. No. 20	N.W.T.S.C.
Re Peg-Win Real Estate Ltd. and Winnipeg Real Estate Board	(1985), 19 D.L.R. (4th) 438	Man. Q.B.
Re Prospect Investments Ltd. and Liquor Licensing Board	(1987), 3 A.C.W.S. (3d) 351	N.B.Q.B.
Re Wright and A.G. Canada	(1986), 56 O.R. (2d) 636	Ont. Dist. Ct.
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Connell v. University of British Columbia	(1988), 21 B.C.L.R. (2d) 145	B.C.C.A.
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Hardie v. District of Summerland	(1985), 68 B.C.L.R. 244	B.C.S.C.
Harrison v. University of British Columbia	(1986), [1986] 6 W.W.R. 7	B.C.S.C.
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Pendergast v. Newfoundland	[1987] N.J. No. 350	Nfld. S.C. (T.D.)
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B.C. Teacher's Fed. v. A.G. British Columbia	(1986), [1987] 1 W.W.R. 527	B.C.C.A.
B.C. Teachers' Fed. v. A.G. British Columbia	(1986), 4 B.C.L.R. (2d) 8	B.C.C.A.
B.C. Teachers' Fed. v. A.G. British Columbia	(1986), 12 C.P.C. (2d) 75	B.C.S.C.
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Hutton v. A.G. Ontario	[1987] O.J. No. 1017	Ont. H.C.
Nova Scotia Michelin Tires Employees Union v. A.G. Nova Scotia	[1986] N.S.J. No. 89	N.S.C.A.

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Re Lavigne and Ontario Public Service Employees' Union	(1986), 55 O.R. (2d) 449	Ont. H.C.
Re Powell River (Dist.) and Malaspina Municipal Management Assoc.	(1986), B.C.L.R.B. 56-20	B.C.L.R.B.
Re The Queen and O.P.S.E.U.	(1986), 57 O.R. (2d) 773	Ont. H.C.
Retail, Wholesale & Department Store Union, Local 580 v. Dolphin Delivery	(1986), [1987] 2 S.C.R. 573	S.C.C.
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Bakht v. Medical Board (Nfld.)	(1986), 60 Nfld. & P.E.I.R. 176	Nfld. C.A.
Beltz v. Law Society of British Columbia	(1986), [1987] 1 W.W.R. 427	B.S.S.C.
Black v. Law Society of Alberta	(1986), 27 D.L.R. (4th) 527	Alta. C.A.
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Casey v. Law Society of Newfoundland	(1986), 58 Nfld. & P.E.I.R. 349	Nfld. S.C.
Charboneau v. College of Physicians and Surgeons of Ontario	(1985), 52 O.R. (2d) 552	Ont. H.C.
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Re Tomen and Federation of Women Teachers' Associations of Ontario	(1987), 61 O.R. (2d) 489	Ont. H.C.
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Hommel v. Hommel	(1985), 71 N.S.R. (2d) 85	N.S.S.C. (T.D.)
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Protection de la Jeunesse — 261	(1987), [1987] R.J.Q. 1461	Que. T.J.
Protection de la Jeunesse — 321	(1987), [1988] R.J.Q. 903	Que. T.J.
Protection de la Jeunesse — 267	(2 December 1987), Montreal 540-41-000113- 869	Que. T.J.
Qually v. Qually	(1986), 53 Sask. R. 161	Sask. C.A.
Re E.L.L.	[1983] Alta. D. 1968-03	Alta. Prov. Ct.
Re F.L.	(1986), 10 B.C.L.R. (2d) 234	B.C.S.C.
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Re M.	(1987), 78 N.S.R. (2d) 383	N.S. Co. Ct.
Re MacVicar and B.C. Superintendent of Family and Child Services	(1986), 34 D.L.R. (4th) 488	B.C.S.C.
Re McTavish and Director, Child Welfare Act	(1986), 32 D.L.R. (4th) 394	Alta. Q.B.
Re Nelson M. and Superintendent of Family and Child Services	(1986), 2 A.C.W.S. (3d) 291	B.C.S.C.
Re Phillips and Petersen	(1986), 36 A.C.W.S. (2d) 335	Ont. Prov. Ct. (Fam. Div.)
Ross v. Reg. of Supreme Court (Fam. Div.)	(1986), 26 D.L.R. (4th) 154	P.E.I.S.C.
S. (S.) v. Dir. of Child & Fam. Services	(1987), [1987] 5 W.W.R. 309	Man. Q.B. (Fam. Div.)
Sangha v. Mander	(1985), [1985] 6 W.W.R. 250	B.C.S.C.
Shewchuk v. Ricard	(1986), [1986] 4 W.W.R. 289	B.C.C.A.
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Tit v. Man. (Dir. of Vital Statistics)	(1986), [1986] 4 W.W.R. 238	Man. Q.B.
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A.G. Nova Scotia v. Phillips	(1986), 34 D.L.R. (4th) 633	N.S.S.C. (A.D.)
Bregman v. A.G. Canada	(1986), 57 O.R. (2d) 409	Ont. C.A.
Bregman v. A.G. Canada	(1986), 55 O.R. (2d) 596	Ont. H.C.
Coulombe c. Commission d'appel en matière de lésions professionnelles	(1987), [1987] R.J.Q. 1822	Que. C.S.
Crupi v. Canada Employment and Immigration Commission	(1986), [1986] 3 F.C. 3	F.C.A.
Deutsch v. Law Society of Upper Canada Legal Aid Fund	(1985), 11 O.A.C. 30	Ont. Div. Ct.
Elgaard v. Elgaard	(1986), 2 B.C.L.R. (2d) 200	B.C.S.C.
Gosselin c. P.G. Québec	(11 December 1986), Montreal 500-06-000012-860	Que. C.S.
Janke v. Canada (War Veterans Allowance Board)	[1987] F.C.J. No. 131	F.C.A.
Kings County v. Cogswell	(1987), 79 N.S.R. (2d) 290	N.S. Co. Ct.

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Panacui v. Legal Aid Society (Alta.)	(1987), 80 A.R. 137	Alta. Q.B.
Phillips v. Social Assistance Appeal Board (N.S.)	(1986), 73 N.S.R. (2d) 415	N.S.S.C. (T.D.)
R. v. Lyzun	[1987] O.J. No. 157	Ont. H.C.
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Re Ominayak and Crombie	(1985), 35 A.C.W.S. (2d) 427	F.C.T.D.
Re Zwarich and A.G. Canada	(1987), 5 A.C.W.S. (3d) 313	F.C.A.
Reference Re Family Benefits Act (N.S.) Section 5	(1986), 75 N.S.R. (2d) 338	N.S.S.C. (A.D.)
Robinson v. A.G. Canada	[1987] 5 A.C.W.S. (3d) 428	F.C.A.
Schachter v. Canada Employment and Immigration Commission	(1988), 18 F.T.R. 199	F.C.T.D.
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Hedstrom v. Commissioner of Yukon Territory	(1985), [1985] 6 W.W.R. 690	Y.T.S.C.
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MacLean v. Nova Scotia	(1987), 76 N.S.R. (2d) 296	N.S.S.C. (T.D.)
O.P.S.E.U. v. Ontario (Attorney General)	(1987), [1987] 2 S.C.R. 2	S.C.C.
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Re Election Act (B.C.)	(1986), [1986] 5 W.W.R. 207	B.C.S.C.
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Mercure v. A.G. Saskatchewan	(1985), [1986] 2 W.W.R. 1	Sask. C.A.
Paquette v. Canada	(1985), [1985] 6 W.W.R. 594	Alta. Q.B.
R. v. Kent	(1986), 27 C.C.C. (3d) 405	Man. C.A.
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Mitchell v. Board of Trustees of Regional Administrative Unit 3	(1986), 60 Nfld. & P.E.I.R. 1	P.E.I.S.C. (G.D.)
R. v. McCloud	[1987] N.J. No. 69	Nfld. S.C.
Re Zylberberg and Director of Education of the Sudbury Board of Education	(1986), 55 O.R. (2d) 749	Ont. Div. Ct.
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R. v. Belton	[1983] Man. D. 5875-01	Man. C.A.
R. v. Forsberg	[1982] B.C.D. Crim. Conv. 5890-07	B.C. Prov. Ct.
R. v. Hendricks	(1987), 1 W.C.B. (2d) 171	Ont. H.C.
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R. v. Proudfoot	[1984] B.C.D. Crim. Conv. 5565-13	B.C. Prov. Ct.
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Dywidag Systems International Canada Ltd. v. Zutphen Brothers Construction	(1986), 75 N.S.R. (2d) 187	N.S.S.C. (T.D.)
Ford v. Newfoundland (Minister of Culture, Recreation and Youth)	[1986] Nfld. J. No. 64	Nfld. S.C. (T.D.)
Lennox Industries (Canada) Ltd. v. Min. of Nat. Rev.	(1987), 8 F.T.R. 124	F.C.T.D.
Morier v. Rivard	(1985), [1985] 2 S.C.R. 716	S.C.C.
Re Dezell and the Sheriff, County of Kent	(1985), 36 A.C.W.S. (2d) 329	Ont. Dist. Ct.
Re Wright and A.G. Canada	[1987] O.J. No. 1158	Ont. H.C.
Saskatchewan Minerals v. Solar U.S.A.	[1986] S.J. No. 521	Sask. C.A.
Western Surety Co. v. Elk Valley Logging Ltd.	(1985), 23 D.L.R. (4th) 464	B.C.S.C.
Wolff v. Canada	[1988] O.J. No. 14	Ont. H.C.

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13.(c) *Miscellaneous: Immigration*

CASE	CITATION	COURT
Bendahmane v. Minister of Employment and Immigration	(1987), 8 F.T.R. 241	F.C.T.D.
Brar v. Minister of Employment and Immigration	(1985), 60 N.R. 344	F.C.A.
Frangipane v. Minister of Employment and Immigration	(1986), 2 F.T.R. 220	F.C.T.D.
James v. Minister of Employment and Immigration	[1987] F.C.J. No. 415	F.C.T.D.
Kravets v. Minister of Employment and Immigration	[1985] D.R.S. 27-657	F.C.T.D.
Re Bell and Minister of Employment and Immigration	(1985), 35 A.C.W.S. (2d) 248	F.C.T.D.
Re Charlton and Secretary of State of Canada	(1987), 6 A.C.W.S. (3d) 5	F.C.T.D.
Re Horbas and Minister of Employment and Immigration	(1985), 22 D.L.R. (4th) 600	F.C.T.D.
Re Williams and Minister of Employment and Immigration	(1985), 35 A.C.W.S. (2d) 247	F.C.T.D.

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13.(d) Miscellaneous: Tax

CASE	CITATION	COURT
Century 21 Ramos Realty Inc. v. R.	(1987), 41 D.T.C. 5158	Ont. C.A.
Gerrard v. Saskatoon (City)	[1987] S.J. No. 619	Sask. C.A.
Giles v. Print Three Inc.	[1987] O.J. No. 1048	Ont. H.C.
Hellenic Import-Export Co. v. M.N.R.	[1987] B.C.J. No. 225	B.C.S.C.
Landsdowne Investment Corp. v. Kamloops Assessor, Area No. 23	(1987), 17 B.C.L.R. (2d) 49	B.C.S.C.
Landsdowne Investment Corp. v. Kamloops Assessor, Area No. 23	(1986), 7 B.C.L.R. (2d) 375	B.C.S.C.
Les Entreprises M.A.Y. Inc. c. Le Sous-ministre du Revenu du Québec	(18 December 1987), Montreal 500-02-047867-846	Que. C.P.
O.P.S.E.U. v. National Citizens Coalition Inc.	(1987), 39 D.L.R. (4th) 449	Ont. H.C.
Re Gerol and A.G. Canada	(1985), 53 O.R. (2d) 275	Ont. H.C.

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13.(e) Miscellaneous: Evidence

CASE	CITATION	COURT
Charles v. Royal Bank of Canada	(1987), 9 W.D.C.P. 1	Ont. S.C.
Fabian v. Margulies	(1985), 53 O.R. (2d) 380	Ont. C.A.
R. v. Bonbernard	[1984] B.C.D. Crim. Conv. 5980-02	B.C. Prov. Ct.
R. v. Gosselin	(1986), 48 Sask. R. 209	Sask. C.A.
R. v. Jackson	[1984] B.C.D. Crim. Conv. 5425-02	B.C. Co. Ct.
Saccomanno v. Bérubé	(1987), 75 A.R. 393	Alta. Q.B.
Seaway Trust Co. v. Kilderkin Investments Ltd.	(1986), 55 O.R. (2d) 545	Ont. H.C.

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13.(f) Miscellaneous: Landlord and Tenant

CASE	CITATION	COURT
Hseun v. Mah	(1986), 7 B.C.L.R. (2d) 21	B.C.S.C.
Newfoundland and Labrador Housing Corp. v. Ryan	(1987), 62 Nfld. & P.E.I.R. 287	Nfld. C.A.
Newfoundland and Labrador Housing Corp. v. Williams	(1987), 62 Nfld. & P.E.I.R. 269	Nfld. C.A.
Newfoundland and Labrador Housing Corp. v. Williams	(1986), 59 Nfld. & P.E.I.R. 275	Nfld. Dist. Ct.
Re Garfella Investments Ltd. and Carneiro	(1986), 2 A.C.W.S. (3d) 36	Ont. Dist. Ct.

13.(g) Miscellaneous: Insurance

CASE	CITATION	COURT
Jardine v. Jardine	(1986), 26 D.L.R. (4th) 634	N.B.Q.B.
Morais v. Commercial Union Assurance Company	(1987), 77 N.B.R. (2d) 386	N.B.C.A.
Morais v. Commercial Union Assurance Company	(1986), 72 N.B.R. (2d) 257	N.B.Q.B. (T.D.)

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13.(h) Miscellaneous: Involuntary Sterilization

CASE	CITATION	COURT
E. (Mrs.) v. Eve	(1986), [1986] 2 S.C.R. 388	S.C.C.
Re K.	(1985), [1985] 4 W.W.R. 724	B.C.C.A.
Re K.	(1985), [1985] 3 W.W.R. 204	B.C.S.C.

13.(i) Miscellaneous: Mandatory Seatbelt Laws

CASE	CITATION	COURT
Feener v. Nova Scotia	(1987), 78 N.S.R. (2d) 22	N.S.S.C. (A.D.)
Montréal (Ville) v. Léger	(1986), 3 Q.A.C. 241	Que. C.A.
R. v. Doucette	(1987), 77 N.S.R. (2d) 279	N.S.S.C. (A.D.)
R. v. Doucette	(1985), 23 C.C.C. (3d) 520	N.S. Prov. Ct.
R. v. Feener	(1986), 74 N.S.R. (2d) 164	N.S.S.C. (A.D.)

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13.(j) Miscellaneous: Other Cases

CASE	CITATION	COURT
Alliance des Professeurs de Montréal v. A.G. Quebec	(1985), 21 D.L.R. (4th) 354	Que. C.A.
Alliance des Professeurs de Montréal v. A.G. Quebec	(1985), 31 A.C.W.S. (2d) 361	Que. Sup. Ct.
Bancroft v. University of Toronto	(1986), 53 O.R. (2d) 460	Ont. H.C.
Borowski v. A.G. Canada	(1987), [1987] 4 W.W.R. 385	Sask. C.A.
Delaronde c. Skye	(5 January 1988), Montreal 500-36-000277- 858	Que. C.S.
Devine v. A.G. Quebec	(1986), 2 A.C.W.S. (3d) 329	Que. C.A.
Gingras v. Canada	(1986), 5 F.T.R. 230	F.C.T.D.
Manitoba Rice Farmers Association v. Human Rights Commission (Man.)	(1985), 37 Man. R. (2d) 50	Man. Q.B.
Morrison v. British Columbia Amateur Hockey Association	(1986), 13 C.P.R. (3d) 556	B.C.S.C.
NKH Ltd. v. Verulam (Township)	(1987), 5 A.C.W.S. (3d) 64	Ont. H.C.
Penikett v. The Queen	(1987), 45 D.L.R. (4th) 108	Y.T.C.A.

continued

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13.(j) Miscellaneous: Other Cases (cont'd)

CASE	CITATION	COURT
Penikett v. The Queen	(1987), 43 D.L.R. (4th) 324	Y.T.S.C.
R. c. Cazes	(1987), [1987] R.J.Q. 2715	Que. C.M.
R. v. Morgentaler	(1985), 52 O.R. (2d) 353	Ont. C.A.
R. v. Morris	[1987] N.S.J. No. 330	N.S.S.C. (A.D.)
R. v. Piper	(1986), 16 W.C.B. 133	Ont. Dist. Ct.
R. v. Skinner	(1987), 79 N.S.R. (2d) 8	N.S.S.C. (A.D.)
Re Blainey and Ontario Hockey Association	(1986), 54 O.R. (2d) 513	Ont. C.A.
Re Blainey and Ontario Hockey Association	(1985), 52 O.R. (2d) 225	Ont. H.C.
Re Getty and Crow	(1985), 52 O.R. (2d) 689	Ont. Dist. Ct.
Russo v. Ontario Jockey Club	(1987), 62 O.R. (2d) 731	Ont. H.C.
Thwaites v. Health Sciences Centre	(1986), 45 Man. R. (2d) 187	Man. Q.B.

APPENDIX B

NOTES CONCERNING THE DATABASE



Notes Concerning the Database

Our equality rights database contains information concerning 591 section-15 decisions. References for these decisions, listed in Appendix A, are to case reports if the case was reported and to summaries or judgements for unreported cases. The decisions include original proceedings, appeals, and interlocutory matters. In our goal to be comprehensive in our search for section-15 cases, we used the three computer search services: *Can Law*, *Quick Law*, and *Soquige* (the service for Quebec cases). These computer search services carry most major case report series in Canada. The services searched for all decisions which came on-line after 17 April 1985 in which section 15 was referred to. The cut-off dates for the searches were as follows: 15 January 1988 for decisions on-line in summary or judgement form; 19 April 1988 for decisions reported in a report series carried by *Can Law*; 12 May 1988 for decisions reported in report series carried by *Quick Law*; and 21 June 1988 for decisions carried by *Soquige*. Some cases in which section 15 received cursory mention only were eliminated; however, others of these were retained because even though the treatment of section 15 was cursory or peripheral the decision was of interest to us. This left us with 591 decisions, of which approximately two-thirds were reported decisions and one-third were in summary or judgement form.

Information concerning all 591 decisions was collected, categorized, analysed, and entered into our database. We were able to retrieve detailed information about every decision, including its subject matter, Charter provisions relied upon, the law at issue, arguments raised, whether any of the participants in the case were members of disadvantaged groups, and its outcome. The reported decisions were subjected to an even more detailed analysis, focussing on additional factors such as whether intervenors were involved in the case, and, if so, whether the intervenor represented interests of a disadvantaged group.

We are indebted to those who assisted us in our research. Much of the initial computer search work and data collection was done by Katherine Tolton, a graduate of the University of Toronto Law School and Janet Darbie, the Librarian for the Toronto law firm of Tory, Tory, DesLauriers and Binnington. Their work was carried out to assist LEAF in the preparation of an intervenor factum for the Supreme Court of Canada hearing (6 and 7 October 1988) in *Mark Andrews*. LEAF generously shared the contents of its database with us. Extensive additional research and analysis for this project were done by Toronto lawyer Anita Braha, Vancouver lawyer Shirley Chu, Toronto legal researcher Susan Joanis of LEAF, Vancouver lawyer Janet Kee, and University of British Columbia law student Katherine Hardie. We also received invaluable professional assistance from Barbara Hopkins, Managing Editor of the *Canadian Human Rights Reporter*.



APPENDIX C
TABLE OF SEX EQUALITY DECISIONS

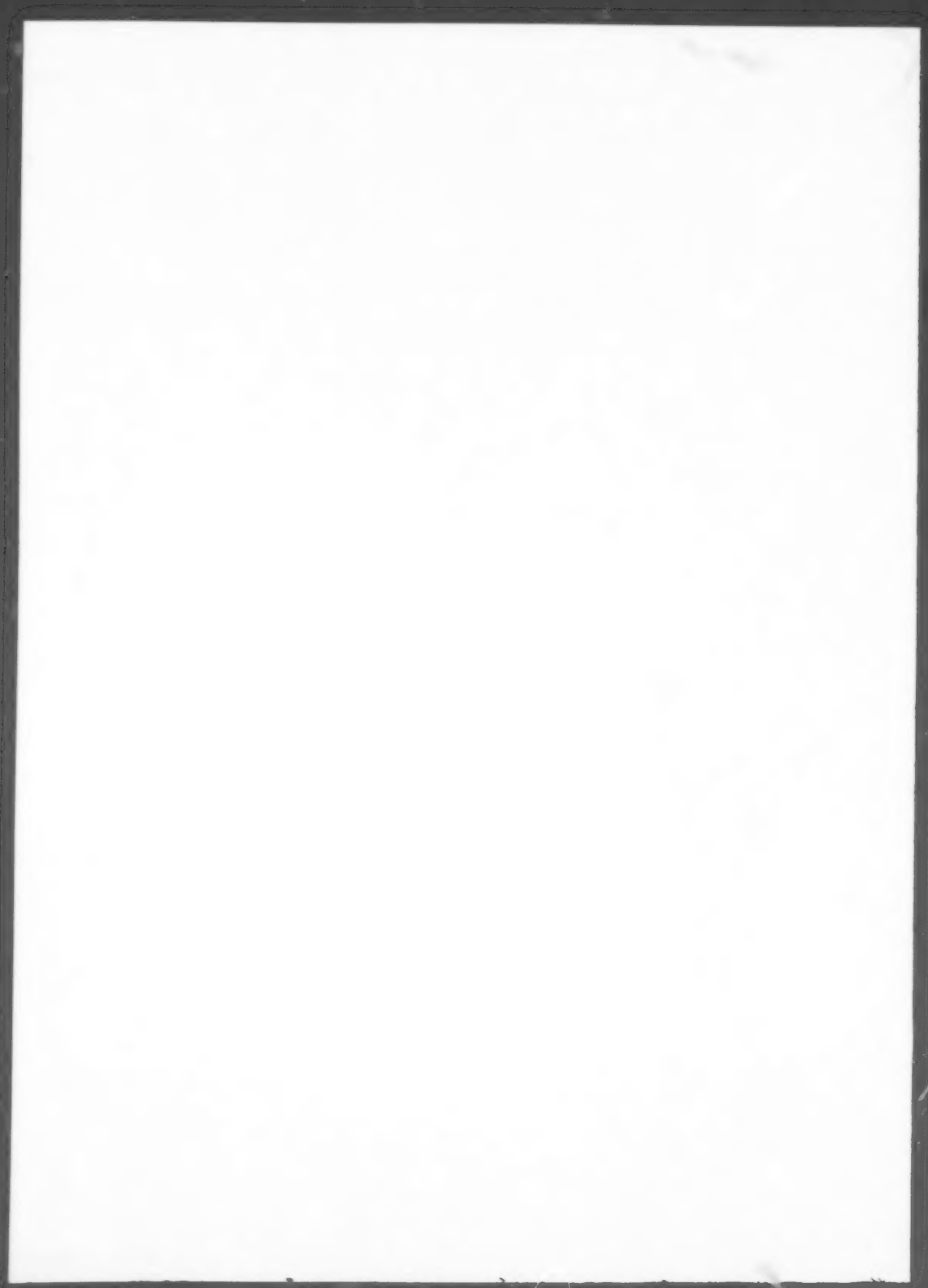


Table of Sex Equality Decisions

Sex Equality Decisions	Women's Cases	Men's Cases
A.G. Canada v. Vincer (1987), 82 N.R. 352 (F.C.A.)		x
A.G. Nova Scotia v. Phillips (1986), 34 D.L.R. (4th) 633 (N.S.C.A.)***		
Anderson v. Luoma (1986), 50 R.F.L. (2d) 127 (B.C.S.C.)*		
Andrews v. Ontario Ministry of Health (1988), 9 C.H.R.R. D/5089 (H.C.)*		
Bomboir v. Harlow (1987), [1987] 5 W.W.R. 55 (Sask. Unif. Fam. Ct.)	x	
Casagrande v. Hinton R.C. Sep. School Dist. No. 155 (1987), [1987] 4 W.W.R. 167 (Alta. Q.B.)	x	
Davidson v. Davidson Estate (1986), [1987] 2 W.W.R. 642 (B.C.C.A.)*		
Friesen v. Gregory (1986), 55 Sask. R. 245 (Sask. Unif. Fam. Ct.)		x
Gorzen v. Litz (1988), 66 Sask. R. 211 (C.A.)**		
Grabbe v. Grabbe (1986), [1987] 2 W.W.R. 657 (B.C.C.A.)*		
Harden v. Harden (1987), 54 Sask. R. 155 (C.A.)		x
Hommel v. Hommel (1985), 71 N.S.R. (2d) 85 (S.C.T.D.)		x
Horii v. Canada (Commissioner of Corrections) (1987), 17 F.T.R. 190	x	
Kastning v. Charles (1987), 80 A.R. 150 (Q.B.)		x
Phillips v. Social Assistance Appeal Board (N.S.) (1986), 73 N.S.R. (2d) 415 (S.C.T.D.)		x
Power v. Moss (1986), 61 Nfld. & P.E.I.R. 5 (Nfld. S.C.)	x	
Protection de la Jeunesse — 274 (1987), [1987] R.J.Q. 1927 (T.J.)		x
R. v. Barrons (1985), 70 A.R. 107 (Q.B.)		x

Table of Sex Equality Decisions

Sex Equality Decisions	Women's Cases	Men's Cases
R. v. Bearhead (1986), 27 C.C.C. (3d) 546 (Alta. Q.B.)		x
R. v. C.M. (1985), 14 W.C.B. 334 (B.C. Prov. Ct.)		x
R. v. Drybones (1985), 23 C.C.C. (3d) 457 (N.W.T.S.C.)		x
R. v. Ferguson (1987), 16 B.C.L.R. (2d) 273 (C.A.)		x
R. v. Howell (1986), 57 Nfld. & P.E.I.R. 198 (Nfld. Dist. Ct.)		x
R. v. Jackson [1984] B.C.D. Crim. Conv. 5425-02		x
R. v. Lucas (1985), 16 C.R.R. 1 (Ont. Dist. Ct.)		x
R. v. Lucas; R. v. Neely (1986), 27 C.C.C. (3d) 229 (Ont. C.A.)***		
R. v. M.E.D. (1985), 47 C.R. (3d) 382 (Ont. Prov. Ct.)		x
R. v. MacDonald (1987), 79 N.S.R. 215 (S.C.T.D.)		x
R. v. Monk (1985), 43 Sask. R. 318 (Q.B.)		x
R. v. Morgentaler (1985), 52 O.R. (2d) 353 (C.A.)	x	
R. v. Morgentaler (1988), [1988] 1 S.C.R. 30**		
R. v. Neely (1985), 22 C.C.C. (3d) 73 (Ont. Dist. Ct.)		x
R. v. Perkins (1987), 59 C.R. (3d) 56 (N.W.T.S.C.)		x
R. v. Poirier (1985), 69 N.B.R. (2d) 1 (Prov. Ct.)		x
R. v. R. (1986), 28 C.C.C. (3d) 188 (Ont. H.C.)		x
R. v. S. (R.) [1987] B.C.J. No. 1255 (B.C. Co. Ct.)		x

Table of Sex Equality Decisions

Sex Equality Decisions	Women's Cases	Men's Cases
R. v. Sylvestre (1986), 30 D.L.R. (4th) 639 (F.C.A.)*		
R. v. Thorburn (1986), 26 C.C.C. (3d) 154 (B.C.C.A.)		x
R. v. W.D.C.G. (1987), 81 N.B.R. (2d) 86 (C.A.)		x
R. v. Wallace (1987), 2 W.C.B. (2d) 73 (Ont. Dist. Ct.)	x	
R. v. White (1986), 60 Nfld. & P.E.I.R. 223 (Nfld. S.C.)		x
Re Blainey and Ontario Hockey Association (1985), 52 O.R. (2d) 225 (H.C.)	x	
Re Blainey and Ontario Hockey Association (1986), 54 O.R. (2d) 513 (C.A.)***		
Re F.L. (1986), 10 B.C.L.R. (2d) 234 (S.C.)		x
Re Getty and Crow (1985), 52 O.R. (2d) 689 (Dist. Ct.)		x
Re MacVicar and British Columbia Superintendent of Family and Child Services (1986), 34 D.L.R. (4th) 488 (S.C.)		x
Re Nelson M. and Superintendent of Family and Child Services (1986), 2 A.C.W.S. (3d) 291 (B.C.S.C.)		x
Re Tomen and Federation of Women Teachers' Associations of Ontario (1987), 61 O.R. (2d) 489 (H.C.)		x
Reference Re Family Benefits Act (N.S.) Section 5 (1986), 75 N.S.R. (2d) 338 (C.A.)***		
Schachter v. Canada Employment and Immigration Commission (1988), 18 F.T.R. 199***		
Schachter v. R. (1987), 8 W.D.C.P. 442 (F.C.T.D)		x
Shewchuk v. Ricard (1985), [1985] 6 W.W.R. 427 (B.C. Prov. Ct.)***		

Table of Sex Equality Decisions

Sex Equality Decisions	Women's Cases	Men's Cases
Shewchuk v. Ricard (1985), [1985] 6 W.W.R. 436 (B.C.S.C.)***		
Shewchuk v. Ricard (1986), [1986] 4 W.W.R. 289 (B.C.C.A.)		x
Shkwarchuk v. Hansen (1984), 30 C.C.L.T. 121 (Sask. Q.B.)		x
Szuts v. Commissioner of Social Services (1986), 13 O.A.C. 200 (Div. Ct.)*		
Tomen v. Ontario Public School Teachers' Federation (1986), 17 O.A.C. 189 (Div. Ct.)***		
Weatherall v. A.G. Canada (1987), 11 F.T.R. 279		x
Williams v. Haugen (1988), [1988] 2 W.W.R. 238 (Sask. Unif. Fam. Ct.)	x	
Wilson v. Medical Services Commission of British Columbia (1987), [1987] 3 W.W.R. 48 (B.C.S.C.)	x	
Wilson v. Medical Services Commission of British Columbia (1988), 30 B.C.L.R. (2d) 1 (C.A.)**		
Total 44	9	35

Note: Reason not included in count:
 * sex was not pleaded as a ground;
 ** not on-line during the search period;
 *** relates to another proceeding.

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The Canadian Advisory Council on the Status of Women was established as an independent advisory body in 1973 in response to a recommendation by the Royal Commission on the Status of Women. Its mandate, "to bring before the government and the public matters of interest and concern to women" and "to advise the Minister on such matters relating to the status of women as the Minister may refer to the Council for its consideration or as the Council may deem appropriate", is wide and may be interpreted to cover all Council activities on behalf of Canadian women.

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Gander, Newfoundland

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Riverport, Nova Scotia

Joyce Mae Robart
Halifax, Nova Scotia

Eva Voisey
Whale Cove, Northwest Territories

About the Authors

Gwen Brodsky is an equality rights litigator, currently engaged as counsel by the British Columbia Public Interest Advocacy Centre (PIAC). She represents women and members of other disadvantaged groups whose voices are not heard often enough in the courts. As the first Litigation Director of the Women's Legal Education and Action Fund (LEAF) from 1985 to 1987, Ms. Brodsky worked, along with others, on many of LEAF's litigation initiatives discussed in this book. Ms. Brodsky has written and spoken extensively about inequality problems and the law.

Shelagh Day has been a human rights practitioner and advocate for almost twenty years. She was British Columbia's first Human Rights Officer, the City of Vancouver's first Equal Employment Opportunity Officer, and the Director of the Saskatchewan Human Rights Commission from 1980 to 1984. Ms. Day was the first President of the Women's Legal Education and Action Fund (LEAF) and is a founding member of the Canadian Disability Rights Council, a new organization which is undertaking strategic litigation for women and men who have disabilities. She is the President and Editor of the *Canadian Human Rights Reporter*.

National Office
110 O'Connor Street, 9th Floor
Box 1541, Station B
Ottawa, Ontario
K1P 5R5
(613) 992-4975

Eastern Regional Office
2021 Union Avenue
Suite 875
Montreal, Quebec
H3A 2S9
(514) 283-3123

Western Regional Office
220-4th Avenue S.E., Room 270
Box 1390, Station M
Calgary, Alberta
T2P 2L6
(403) 292-6668

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